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Kinkaid on Irrigation Law of Colorado

*The law of irrigation as enunciated by the
Colorado appellate courts and the
statutes on water rights
and irrigation*

By
D. B. KINKAID
of the
DENVER BAR

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WHEEL GRAPHIC

TABLE OF CONTENTS

CHAPTER I.

ABANDONMENT.

	Section
Definition	1
Acquiescence	2
Elements	3
(a) Intention.	
(b) Non-use.	
Evidence	4
Ditch	5
Milling Priority	6
Mill-race	7
Repairs—Failure to make	8
Right to Water	9
Subsequent to decree	10
Use of Abandoned Water	11
What can be abandoned	12
When complete	13
Who may raise question	14

CHAPTER II.

ADJUDICATION.

Capacity of Canal—Calculation	15
(a) Decree—Res adjudicata	
(b) Kutter's Formula.	
(c) Res Adjudicata—Collateral Attack.	
Decrees	16
(a) Appeals.	
(b) Conditional.	
(c) Effect of decree.	
(d) Failing to number ditches.	
(e) For an additional appropriation.	
(f) For excessive quantity	
(g) Review and rehearing	
(h) Pleading.	

	Section
(i) Void—Setting aside.	
(j) What is decreed.	
(k) When may be attacked—conditional.	
(l) Obstructions in stream.	
Determining amount of water—Acres considered.....	17
Distribution under decree	18
Duty of ditch owners in re adjudication	19
Effect of adjudication	20
For domestic mining or milling purposes	21
Jurisdiction of court in adjudication proceeding.....	22
Limitation of actions for adjudication	23
(a) As to proceeding after the Statute has run.	
(b) Four years.	
(c) Two years.	
(d) Parties affected.	
(e) Laches.	
(f) Re-argument or review.	
(g) Sale of excess rights.	
Nature of adjudication	24
(a) Proceeding in rem.	
(b) Quieting title.	
(c) Sul Generis.	
Notice	25
(a) Change of point of diversion.	
District No. 10	26
Part of district.....	27
Police power	28
(a) Statutes.	
(b) Regulation—Not destruction.	
Referees findings	29
(a) On appeal.	
(b) Change by court.	
Relation back	30
Rights of consumers from a ditch	31

CHAPTER III.

APPEALS.

Affidavits—Bill of exceptions	32
Bill of exceptions lacking	33
From State Supreme Court to U. S. Supreme Court.....	34
(a) Grounds for a certificate for an appeal.	
(b) Question must be raised in State Court before judgment.	

TABLE OF CONTENTS

5

	Section
Limitation on appeals	25
Method of taking appeals	36
(a) Statutory.	
(b) Ex Parte.	
(c) Time.	
Parties entitled to an appeal	37
(a) Those representing a ditch.	
(b) Consumers.	
Prejudicial error—Presumption on appeal.....	38
Public Policy	39
Remand for new trial—Res adjudicata	40
Rehearing and review does not waive right to appeal	41
Time for filing transcript	42
Transcript—Certification	43
Verification of statement for an appeal	44

CHAPTER IV.

APPROPRIATION.

Artificial Waters	45
Waters from mines	46
Water from springs	47
(a) Right to—	
Abandoned water	48
Seepage, percolating or drainage water	49
Surface or waste water at terminus of ditch	50
Additional flow—Tunnel	51
Water from tributaries	52
(a) What is considered as a tributary.	
Holder of option to purchase land	53
For cities and towns	54
For domestic use	55
(a) Priority.	
Milling purposes	56
(a) Right to sell appropriation.	
(b) Subsequent appropriation, of returned water, for irrigation.	
Reservoirs	57
Speculative purposes—Allowed but limited	58
From canon, not a running stream	59
In Colorado for use in New Mexico	60
On public land	61

	Section
Act of Congress recognizing appropriations	62
(a) Vested rights.	
(b) Act construed.	
(c) Recognition of existing rights.	
Act of territorial legislature	63
Constitution regarding appropriation	64
(a) Construed.	
Amount appropriated—Limited	65
Beneficial use of water appropriated	66
(a) Most important factor.	
(b) Decree—Referee's findings.	
(c) Excessive diversion is <u>not</u> to beneficial use.	
Change of purpose of use	67
Change of character and method of use	68
Double Duty	69
Enlarged use	70
(a) Defined.	
(b) In general.	
(c) Proof.	
"First in Time First in Right"	71
Fish lake	72
Flood and surplus water may be appropriated	73
Headgate—Tapping canal	74
Intent to appropriate	75
Map and statement act	76
(a) Statements.	
Place of use	77
Priority	78
(a) How acquired.	
(b) Measure of.	
(c) To ditches.	
(d) Different—from same ditch.	
(e) Mode of diversion—Unimportant.	
(f) Ownership, distinguished from ownership of stock in a corporation.	
Returned waters—Sufficient to satisfy appropriation.....	79
Riparian rights—Distinguished from constitutional and statutory rights	80
Right to water appropriated to a freehold estate	81
Same quantity may be appropriated for use at different times....	82
Senior appropriators cannot enlarge rights to injury of junior appropriators	83
Tenants in common	84

	Section
Title to land on which water is used is not necessarily in the appropriator	85
What does not constitute an appropriation	86
(a) A mere diversion.	
(b) A grant.	
(c) An enlargement of a ditch.	
(d) Use by permission.	
(e) Use during high water.	
Waste waters—Appropriation of	87
(a) Excess water flowing on surface of land.	
(b) From ditch.	
(c) From tunnel.	
(d) Return to stream.	

CHAPTER V.

CANAL COMPANIES.

Defined	88
(a) Quasi public carrier.	
(b) Trustee for consumer.	
(c) Nature of canal company.	
Application for water to company—Time to make	89
By-Laws of canal company regarding change of place of use	90
By-Laws of Mutual Ditch company	91
(a) Forfeiture under by-laws.	
Compensation of canal companies	92
(a) Sale of stock for non-payment of assessment—Notice.	
Contract—Canal company with consumer	93
(a) Action on.	
(b) Cancellation of contract as to excess rights sold.	
(c) For use on specified lands.	
(d) For right of way.	
(e) Form of contract.	
(f) Interference by county commissioners.	
(g) Part of water right must be delivered.	
(h) Payment for water in advance.	
(i) Priority of use.	
(j) Re-organization.	
(k) To convey the canal to consumers.	
(l) Option—Terminates at will of consumer.	
(m) To deliver water in separate shares.	
(n) Parole.	
(o) Proof of contract—Voluminous.	
(p) Form of contract.	

	Section
(q) That consumer may forcibly take water—Void.	
(r) To enlarge a ditch—Perpetual water right.	
(s) To use water cannot be construed as an appropriation.	
(t) To purchase.	
(u) Unrecorded—Innocent purchaser.	
Duties of company	94
(a) To sell water.	
(b) To furnish water.	
(c) To keep ditch in repair.	
Oral contract to furnish water perpetually is not within the Statute of Frauds	95
Rates of charge for water—County commissioners fix	96
(a) Reasonable.	
(b) Demand for change of rates.	
(c) Special contract.	
(d) Maximum amount.	
(e) Petition—Parties.	
Right to purchase water from canal company	97
Rules of company—Conditions precedent	98
Stock—Ownership—Distinguished from ownership of a priority....	99
Sale of excess rights	100
Transfer of interests to a new corporation under contract.....	101
Unincorporated canal companies	102
(a) May be formed by the owners of a ditch.	
(b) The contract entered into in forming a joint stock company may be enforced.	
(c) The contract or articles of association are analagous to the charter of a corporation or articles of partnership.	

CHAPTER VI.

CHANGE OF POINT OF DIVERSION.

Point of diversion—Construed	103
Contract to purchase if change allowed	104
From one district to another	105
Injurious effect	106
(a) Loss by seepage and evaporation.	
(b) To party complaining.	
(c) Rapidity of flow.	
(d) Waste water.	
(e) To junior appropriators.	
Mutual Ditch Company	107
(a) Injurious effect.	
(b) By one or more members.	

TABLE OF CONTENTS

9

	Section
Notice	103
On terms	109
Of place of use	110
Pleading injury	111
Quieting title	112
Right to	113
(a) Qualified.	
(b) Vested.	
Statutes regarding	114
(a) Remedial.	
(b) Proceeding must be followed.	
Times of scarcity	115
What can be shown on application	116
(a) Enlarged use.	
(b) Abandonment.	
What not to be determined	117
Vested right of junior appropriator	118

CHAPTER VII.

CONVEYANCE.

Conveyance of water may be made separate from land	119
By delivery of certificates	120
By deeds of trust	121
(a) Intention.	
(b) On shares of stock.	
(c) On after acquired water rights.	
(d) Statute of limitation.	
(e) Redemption.	
Appurtenance	122
(a) General doctrine.	
(b) Easment may be.	
(c) Need of water will not make it appurtenant.	
(d) After acquired water right.	
(e) Stock in ditch company does not make water appurtenant.	
(f) A right of way.	
Covenant	123
(a) "Together with water sufficient to irrigate said land."	
(b) Of warranty.	
(c) Imposing burden on land.	
Description of water right in deed controls	124
Deed silent as to water right—Presumption	125
(a) Intention governs.	

	Section
Mechanics' lien	126
Mortgage	127
(a) Of after acquired property by the officers of a corporation.	
(b) Release—Partial.	
(c) Statement in an application for loan.	
(d) Conspiracy by directors of a company in regard to mortgage.	
Mutual Ditch company	128
(a) Conveyance of stock conveys water.	
(b) Conveyance of part of water right.	
Notice of easement—Perpetual right	129
Notice of sale of excess rights	130
Notice to purchaser	131
Oral contract to convey water	132
Riparian owner—Domestic purposes	133
Unpaid balance for water under contract—Sale of land—Agent	134

CHAPTER VIII.

DAMAGES.

Complaint in action for	135
In condemnation proceedings—Conclusiveness of judgment	136
Instructions	137
Measure of	138
(a) Destruction of ditch.	
Mortgage—Action brought before maturity of debt	139
Overflowing ditch	140
Permanent improvements	141
To growing crops—Mortgagee	142
Trespass	143

CHAPTER IX.

DISTRIBUTION.

Bonus or condition precedent	144
Change of character of use or place of diversion	145
Commingled waters—Rights in	146
Decree controls	147
Extension of ditch—Relative rights of consumers	148
Loan of water	149
(a) Injurious effect.	
(b) Party to defend rights.	
(c) Statutes relating to loan of water.	
(d) When loan of water cannot be made.	

	Section
Method of carrying water	150
Pollution of stream	151
(a) By alkali.	
(b) By a licensee.	
(c) Supreme court's jurisdiction.	
Pro-rating	152
(a) Among consumers from same ditch.	
(b) Cannot be construed so as to interfere with existing rights.	
(c) Parties to suit for pro-rating.	
(d) Proof in action for pro-rating.	
State officers duties	153
Waste—Prohibited	154

CHAPTER X.

DITCHES.

Enlargement and use by others	155
Interests therein—How transferred	156
Repair of	157
Estimated capacity	158
Stream abandoning its former course	159

CHAPTER XI.

DIVIDE.

Conveying water across a divide	160
---------------------------------------	-----

CHAPTER XII.

EASEMENT.

Abandonment of	161
Across an easement	162
Contract for	163
(a) May be contract for water from ditch.	
(b) Not in writing.	
Conveyance of—As an appurtenance	164
Created by contract	165
Equity jurisdiction in action to protect	166
Notice to purchaser	167
Perpetual right an easement	168
Possession.	169
Prescription	170

	Section
Right of way	171
(a) For ditch is an easement.	
(b) Given after trust deed.	
(c) Not title in fee.	
Specific performance—Action to enforce	172
Title to revert	173
Time when acquired	174

CHAPTER XIII.

EMINENT DOMAIN.

Damages	175
For private use	176
What to be and not be determined in condemnation	177

CHAPTER XIV.

EVIDENCE.

Of abandonment	178
Admission—In complaint in former suit	179
Adjudication—Testimony in	180
Burden of proof	181
(a) Of abandonment.	
(b) Of right under abandonment.	
(c) Of abandonment of part of a water right.	
(d) That percolating water augments flow of stream.	
(e) That tributary does not reach main stream.	
(f) That volume not diminished by diversion from tributary.	
Change of diversion	182
Data of water commissioner	183
Declarations	184
Easement—Parole grants	185
In action relating to pro-rating of water	186
Intention	187
Objections to evidence—Main point in issue	188
Objections to evidence in an equity case	189
Of decree	190
Of written instruments—Oral—To contradict	191
Of quantity of water flowing in a stream	192
Of title to water	193
(a) Possession and use prima facie.	
(b) Title to land not proof.	

TABLE OF CONTENTS

13

	Section
Voluminous documents	194
(a) Oral.	
(b) Best—Secondary.	

CHAPTER XV.

FORFEITURE.

Of right to water—Non-payment of carriage charges.....	195
Of reservoir sites	196
By change of the head of ditch	197

CHAPTER XVI.

INCREASED FLOW.

May be taken out of stream lower down	198
What is an increased flow	199
What is not an increased flow	200

CHAPTER XVII.

IRRIGATION DISTRICTS.

Admission of land into the district	201
Boundaries of the district to be determined by board	202
Confirmation of proceedings by court	203
Constitutionality of the act	204
(a) Title.	
(b) In general—Upheld.	
Division of district during pendency of adjudication.....	205
Exclusion of land from the district	206
Notice of forming of district	207
(a) Signed separately.	
(b) To whom given.	
Proof of ownership of land	208
(a) Abstract not proof.	
(b) Affidavits not sufficient.	
(c) Best evidence.	

CHAPTER XVIII.

PLEADING AND PRACTICE.

Abandonment—Special plea	209
Adaptation of law to changed conditions	210
Arizona and New Mexico dissimilar to Colorado	211
Adjudication—Allegation of—Prima facie	212

	Section
Allegations—Legal conclusions	213
(a) When appropriation is not in issue.	
Amount of water in adjudication	214
Collateral attack	215
Criminal law—Contempt	216
Criminal law—Information	217
Cross bill	218
Enlarged use	219
Evidence—None—Dismissal	220
Judgment—Conclusiveness—Condemnation	221
Equity	222
(a) Jurisdiction—Easements	
(b) Jury—Advisory.	
(c) Sufficiency of pleading.	
(d) Relief to one not a party to an adjudication.	
Estoppel	223
(a) Acquiescence.	
(b) As to sale of excess rights.	
(c) By conduct or contract.	
(d) By receiving water under a decree.	
(e) Corporation—Assessments on stock.	
(f) Evidence of estoppel.	
(g) Pleading estoppel.	
(h) What necessary to establish.	
Fraud—Setting aside decree therefor	224
Injunction	225
(a) Complaint.	
(b) Defense—Action by senior against junior appropriator.	
(c) For interference with water right.	
Intervention	226
(a) Questions raised.	
(b) Sufficiency of pleading.	
(c) Who may intervene.	
(d) When not necessary to intervene.	
Judge—Disqualified to try cause	227
Judicial notice	228
Jurisdiction	229
(a) Acquiescence.	
(b) Appropriation in Colorado for use in New Mexico.	
(c) Effect of judgment without jurisdiction of person—Meritorious defense.	
(d) Of district court.	
(e) Of part of district.	

	Section
Laches	230
Lapse of time	231
Mandamus	232
(a) Affidavit.	
(b) Alternative writ of.	
(c) Commanding that to be done which is impossible to perform.	
Objection to judgment—Trial to court	233
Parties	234
(a) Canal company.	
(b) Consumers—In adjudication.	
(c) Defect of parties.	
(d) Grantors.	
(e) In injunction.	
(f) Sale of excess rights.	
(g) Loaning water.	
(h) Necessary—In action relating to excess rights.	
(i) State officers.	
(j) To adjudication.	
Prescriptive right	235
Replication—Aiding complaint	236
Prejudicial error—Presumption on appeal	237
Variance—When not fatal	238
Receivers—Indebtedness created by	239
Setting aside a decree—Stranger to action	240
Venue—Change	241
Wyoming	242

CHAPTER XIX.

PRESCRIPTIVE RIGHT.

Water from reservoir	243
Adverse user—Color of title	244
Paper title required	245

CHAPTER XX.

QUIETING TITLE.

Change of point of diversion	246
Complaint in action for	247
Jurisdiction—Equity	248
Parties to action	249
(a) State officers.	
(b) Administrator.	

	Section
To a parole gift	250
To a perpetual water right	251
To a water right	252

CHAPTER XXI.

RESERVOIRS.

Appropriation for	253
Built by state	254
Change of place of storage	255
Conditional decree	256
Liability for damages	257
Date of priority	258
Distinguished from water for immediate irrigation	259
One filling only	260
Use of returned water for reservoir	261
When water may be stored	262
Reservoir sites	263
(a) Filing map.	
(b) Forfeiture.	
Undeveloped reservoirs	264

CHAPTER XXII.

RES ADJUDICATA.

Applicable to what matters	265
Decree in adjudication	266
Evidence	267
Identity of parties	268
In general	269
When applicable	270

CHAPTER XXIII.

REVIEW AND REHEARING.

Petition for	271
Proceeding	272
Parties	273
Strangers attacking	274
To ditches	275
Good cause must be shown	276
Objections and exceptions	277

CHAPTER XXIV.

STATE OFFICERS.

	Section
Duties of in distributing water	278
Parties in action to quiet title	279
Water commissioner	280
(a) Closing headgate of ditch.	
(b) Compensation of.	
(c) Loaning water.	
(d) Powers.	
Superintendent of irrigation	281
(b) Authority—Nature of.	
(b) Action for fees.	
(c) Compensation of.	

CHAPTER XXV.

SUBTERREANEAN WATERS.

How considered and governed	282
Loss of water	283
(a) By evaporation.	
(b) By percolation.	
Percolating waters	284.
(a) California rule.	
(b) Diversion of.	
(c) Ownership of.	
(d) Presumption in regard to disappearing waters.	
(e) Part of stream.	
(f) What is not percolating water.	
(g) Withdrawal of water of a stream by—	
Seepage waters	285
Well—Near stream	286

CHAPTER XXVI.

TAXATION.

Cities—Purchasing land for the water—Exemption	287
Ditches—Exemption	288
License tax—Annual	289

TABLE OF CONTENTS

CHAPTER XXVII.

TITLE.

	Section
To water—How proven	290
To water—Unappropriated	291
To water—Appropriated	292

CHAPTER XXVIII.

VESTED RIGHTS.

Accruing prior to the adoption of the constitution	293
Antedating constitution	294
Antedating legislation	295
Before patent	296
Pleading in equity to maintain vested right	297
Protected by constitution	298
Definition of	299
Junior appropriator as against a senior appropriator	300
Prior to statute	301
Recognized by first legislature	302
State engineer interfering with	303

CHAPTER XXIX.

WATER RIGHT.

Property right	304
Lessee may acquire	305
Not a grant	306
More than one in same ditch	307
Proof of	308

CHAPTER XXX.

CONSTITUTIONAL PROVISIONS.

Water public property § 5, Art. 16.
Diverting unappropriated water—Priority § 6, Art. 16.
Right of way for ditches, flumes § 7, Art. 16.
County commissioners fix rates for water § 8, Art. 16.

CHAPTER XXXI.

COLORADO CORPORATION IRRIGATION STATUTES.

	Section
1. Ditch companies	988-997
2. Flume and pipe line companies	998-999
3. Water Users Association	1000-1001

CHAPTER XXXII.

COLORADO IRRIGATION STATUTES.

1. Right of way—Appropriation—Use of water.....	3165-3232
2. Duties of owners	3233-3261
3. Rate of charge for water	3262-3275
4. Adjudication of priorities	3276-3320
5. State engineer	3321-3334
6. Irrigation divisions—Division engineers.....	3335-3352
7. Water districts—Water commissioners	3353-3439
8. Irrigation districts	3440-3494
8-A. Drainage Districts	3494—H.—3494-03
9. Offenses	3495-3498
10. State canals and reservoirs and the control thereof....	3499-3562

Table of Cases Cited

	Page.
Ahern v. Directors (39 C. 409).....	141, 142
Alamosa Co. v. Nelson (42 C. 140).....	30, 31, 34, 133
Anderson v. Grand Valley Dis. (35 C. 525).....	142
Armstrong v. Larimer Co. (1 C. A. 49).....	190, 191, 192
Arnett v. Linhart (21 C. 188)	102, 104, 105
Arthur v. Israel (15 C. 147)	152
Arthur Co. v. Strayer (115 P. 724)	121
Achenfelter v. Carpenter (37 C. 534)	96
Baer Bros. Co. v. Wilson (38 C. 101)	93
Baldrige v. The Leon Co. (20 C. A. 518)	171, 191
Basey v. Gallagher (20 Wall. 670).....	63
Bates v. Hall (44 C. 360).....	41, 70, 74, 92, 95, 97, 136, 137, 189
Beaver Brook Co. v. St. Vrain Co. (6 C. A. 130).....	29, 30, 132, 168
Bessemer Co. v. Wooley (32 C. 437).....	102, 105
Big Thompson Co. v. Mayne (36 C. 355)	134
Blake v. Boye (38 C. 55)	68, 127
Blakeley v. Ft. Lyon Co. (31 C. 224).....	82, 90 109, 151, 158, 160
Bloom v. West (3 C. A. 212)	102, 104, 137, 194
Board of Commissioners v. McLean (115 P. 525).....	180
..... v. Mountezuma Co. (39 C. 166).....	88
..... v. People (8 C. A. 43).....	88
..... v. Wheeler (39 C. 207)	181
Boglino v. Giorgetta (20 C. A. 338).....	63, 122
Booth v. Trager (44 C. 409)	104
Boulder Co. v. Hoover (48 C. 343)	178, 179
..... v. Leggett Co. (36 C. 455)	132, 135
Breen v. Richardson (6 C. 605)	158
Broad Run Co. v. Deuel & Snyder Co. (47 C. 573) 42, 44, 45, 46, 47, 150	
Broadmoor v. Brookside Co. (24 C. 541).....	47, 59, 65, 110
Brothers v. Brothers (29 C. 69)	165
Brown v. Birdin (40 C. 247).....	117
..... v. Farmers Co. (26 C. 66)	118, 119
Bruening v. Dorr (23 C. 195).....	56, 184
Buckers Co. v. Farmers Co. (31 C. 62).....	140, 184, 185
..... v. Platte Valley Co. (28 C. 187).....	52, 53, 133
Burlington R. R. v. Colorado Eastern R. R. (38 C. 95)	127, 129
Burkhart v. Melberg (37 C. 187)	65, 75
Burnham v. Freeman (11 C. 601)	122
Burris v. Craig (34 C. 383).....	148
Butterfield v. O'Neill (19 C. A. 7)	33, 135
Cache la Poudre Co. v. Hawley (43 C. 32).....	65, 66, 154, 155
..... v. Larimer & Weld Co. (25 C. 144) 34, 66, 73, 98, 108, 135	
..... v. Water Co. (25 C. 161).....	33
..... v. (25 C. 161)	33
Canal Co. v. Loutsenheizer (23 C. 233).....	42, 43, 44, 50, 78, 158, 172, 193
Carroll v. Vance (39 C. 216).....	154
Cash v. Thornton (3 C. A. 475)	112, 193
Central Trust Co. v. Culver (35 C. 93).....	135
Chamberlain v. Auster (1 C. A. 13)	110
Chapman v. Phillips Co. (17 C. A. 236).....	181
Chew v. Commissioners (18 C. A. 162)	181
Chicosa Co. v. El Moro Co. (10 C. A. 276).....	86, 125
Child v. Whitman (7 C. A. 117)	102, 105

TABLE OF CASES CITED

23

	Page.
Church v. Stilwell (12 C. A. 43)	82, 150, 152
Clark v. Ashley (34 C. 285)	56, 163, 186
Cleary v. Skiffich (28 C. 362)	103
Coffin v. Left Hand Co. (3 C. 447).....	63, 69, 123, 191
Colorado F. & I. Co. v. Cummings (8 C. A. 541).....	161
Colorado L. & W. Co. v. Rocky Ford Co. (3 C. A. 545)....	33, 74, 132
Colorado M. & E. Co. v. Larimer & Weld Co. (26 C. 47)	64, 170
Colorado Springs v. Commissioners (36 C. 231)	187
Combs v. Agr. D. Co. (17 C. 146).....	62, 65, 72, 81, 89, 90, 136
..... v. Farmers Co. (38 C. 420)	39, 41, 42, 115, 149, 155, 160
Conley v. Dyer (43 C. 22)	34, 64, 74
Con. Home Co. v. New Loveland Co. (27 C. 521).....	43, 156
Cooper v. Shannon (36 C. 98)....	30, 31, 32, 65, 102, 105, 139, 166, 193
Crawford Co. v. Needle Rock Co. (49 C. 362).....	34, 37, 65
Crippen v. Comstock (17 C. A. 88)	101, 102, 104, 105, 107
..... v. Glasgow (38 C. 104)	92, 93
..... v. Bourroughs (27 C. 155).....	176, 177
..... v. The X. Y. Co. (32 C. 447) 42, 44, 46, 156, 160, 162, 173, 177.	
Crisman v. Helderer (5 C. 589)	41, 148
Croke v. American Bank (18 C. A. 3)	85, 87, 125, 135, 136, 149
Cushman v. Highland Co. (3 C. A. 437)	118
Daum v. Conley (27 C. 56).....	49, 50, 51, 53, 110
Davis v. Randall (44 C. 48)	104
De Graffenried v. Savage (9 C. A. 131)	85
Denver, etc. R. R. Co. v. Dotson (20 C. 304)	62, 112
Denver C. I. & W. Co. v. Middaugh (12 C. 434).....	111, 113, 129, 152
Denver v. Walker (45 C. 387)	86
Derry v. Ross (5 C. 295)	30
Diez v. Hartbauer (46 C. 599).....	66, 96
Ditch Co. v. Ditch Co. (22 C. 115)	33, 34, 42, 43, 153
Doland v. Grand Valley Co. (28 C. 150).....	84, 161
Dorr v. Hammond (7 C. 79)	30
Downey v. Twin Lake Co. (41 C. 385)	83
Downing v. More (12 C. 316)	121, 129
Drach v. Isola (48 C. 134)	34, 39, 41, 65, 74
Du Boise v. Clarke (12 C. A. 220)	156
Eaton v. Larimier & Weld Co. (35 C. 16)	67
Empire Co. v. Rio Grande Co. (21 C. 244)	188
Equitable Co. v. Montrose Co. (20 C. A. 465)	112, 113
Evans v. Swan (38 C. 92)	48
Fairplay Co. v. Weston (29 C. 118)	118
Farmers Co. v. New Hampshire Co. (40 C. 467) 102, 104, 113, 124, 126	
Farmers Co. v. Southworth (13 C. 112).....	42, 67, 70, 72, 146
Farmers Co. v. White (32 C. 114).....	85, 118, 119, 133
Farmers Ind. Co. v. Agricultural Co. (3 C. A. 255).....	160
Farm Inv. Co. v. Alta Co. (28 C. 408)	106
Farmers Union Co. v. Rio Grande Co. (37 C. 512) 40, 57, 76, 140, 147, 192	
Finley v. Cache la Poudre Co. (44 C. 234)	65
Flick v. Hahns Peak Co. (16 C. A. 485)	83, 85
Fluke v. Ford (35 C. 112).....	105, 164
Provert v. Mesa Co. (39 C. 71)	180
Ft. Lyon Co. v. Ark. V. S. B. & I. L. Co. (39 C. 332).....	39, 92, 116
..... v. Chew (33 C. 392)	116, 117, 146

Ft. Lyon Co. v. The S. B. & X. I. L. Co. (39 C. 322)	44
Ft. Morgan Co. v. South Platte Co. (18 C. 1)	67, 193
Fuller v. Swan River Co. (12 C. 12)	66, 70, 72, 95, 98, 149
Fulton Co. v. Twombly (6 C. A. 554)	153
..... v. Meadow Island Co. (35 C. 588)	66, 97
Garbanati v. Fassbinder (15 C. 535)	87
Garfield Co. v. Beardsley (18 C. A. 53)	125
Garnet Co. v. Sampson (48 C. 285)	169
Gelwicks v. Todd (24 C. 494)	102, 104
Gibson v. Cann (28 C. 499)	130
Golden Co. v. Bright (8 C. 144)	80, 87, 89, 157
Grand Valley Co. v. Fruita Co. (37 C. 483)	81, 172, 174
..... v. Leshner (28 C. 273)	100, 104, 108, 126, 165, 168
Greeley C. v. House (14 C. 549)	112
Greer v. Heisler (16 C. 307)	32, 44, 117, 139
Guthell Park Co. v. Montclair (32 C. 420)	126, 154, 164, 166
G. W. M. Co. v. W. of A. M. Co. (12 C. 46)	156
Hackett v. Larimer & Weld Co. (48 C. 178)	115, 127, 147, 155, 161, 163
Hagerman v. Bates (24 C. 71)	157
Hall v. Johnson (21 C. 418)	101
..... v. Lincoln (10 C. A. 360)	30, 31, 132, 133
Hallett v. Carpenter (37 C. 30)	48, 94, 97
Hamile v. Hall (4 C. A. 290)	87
Handy Co. v. Lander Co. (27 C. 151)	93, 95, 98
..... v. South Side Co. (26 C. 333)	44, 152, 156, 172
Hecter Co. v. Valley View Co. (28 C. 315)	146
Heney v. Travelers Ins. Co. (16 C. 179)	107, 154
Humphreys Co. v. Frank (46 C. 524)	68
Hunt v. Hoyt (10 C. 278)	87
Independent Ditch Co. v. Agricultural Ditch Co. (22 C. 513)	57, 70, 74, 78, 92, 158, 160, 181
Jarvis v. State Bank (22 C. 309)	105
Jerome v. Bohm (21 C. 322)	158
Kerr v. Burns (42 C. 284)	151, 155, 156, 162
..... v. Dudley (26 C. 457)	53
Kimball v. Northern Co. (42 C. 412)	83, 164, 165
King v. Achroyd (28 C. 448)	69, 87, 102, 105
Knowles v. Clear Creek Co. (18 C. 209)	80
La Jara Assn. v. Hansen (35 C. 105)	47, 57, 76, 186
La Junta Co. v. Hess (6 C. A. 497)	82, 83, 90, 162
..... v. Kreybill (17 C. A. 26)	137
Lake Fork Co. v. Haley (28 C. 513)	38, 39
Lamar Co. v. Amity Co. (26 C. 370)	50, 51, 69
..... v. Belknap Bank (28 C. 344)	106
Lampson v. Valles (27 C. 201)	48, 156
Land Co. v. Ditch Co. (18 C. 1)	70
Larimer Co. v. People (8 C. 614)	68
Larimer & Weld Co. v. Wyatt (23 C. 480)	84, 118, 122, 191
Leadville W. Co. v. Leadville (22 C. 297)	83
Lombard v. Overland Co. (41 C. 253)	82
Louden Co. v. Handy Co. (22 C. 102)	42, 43, 44, 45
Lower Latham Co. v. Bljou Co. (41 C. 212)	92, 93, 94, 96, 97
..... v. Louden Co. (27 C. 267)	39, 116, 119, 153, 154, 163, 174, 183

TABLE OF CASES CITED

25

	Page.
Mabee v. Platte Land Co. (17 C. A. 476)	75
Mack v. Jackson (9 C. 537)	112
McClellan v. Hurdle (3 C. A. 430)	185, 186
McClure v. Keon (25 C. 284)	87, 109, 147
McElravy v. Brooks (48 C. 207)	74
Medano Co. v. Adams (29 C. 317)	146, 182, 183, 185
Mill Co. v. Irrigation Co. (26 C. 47)	73
Morsey v. Lett (18 C. 128)	154
Murray v. Commissioners (28 C. 427)	187
Napier v. Glenwood Co. (49 C. 208)	51, 169
Nesmith v. Martin (32 C. 77)	58, 136
New Cache la Poudre Co. v. Arthur (37 C. 530)	96
..... v. Water Co. (29 C. 469)	80, 95, 96, 97
New La Junta Co. v. Kreybill (17 C. A. 26)	107, 171
New Loveland Co. v. Con. Home (27 C. 525)	168, 169, 170
New Mercer Co. v. Armstrong (21 C. 357)	30, 31, 32, 39, 40, 42, 61, 64, 74, 132, 135, 194
Nichols v. Lantz (9 C. A. 1)	29, 30
..... v. McIntosh (19 C. 22)	30, 32, 44, 65, 70, 173
Nipple v. Forker (26 C. 74)	62, 63, 171
Northern Co. v. Richards (22 C. 450)	114
O'Brien v. King (41 C. 487)	33
Ogilvy Co. v. Insinger (19 C. A. 380)	58, 92
Oligarchy Co. v. Farm Inv. Co. (40 C. 291)	101, 103
O'Neill v. Ft. Lyon Co. (39 C. 487)	48, 78, 84, 116
Oppenlander v. Left Hand Co. (18 C. 142)	48, 72, 100, 102, 123
O'Reilly v. Noxon (49 C. 362)	171
Ortiz v. Hansen (35 C. 100)	129
Outcalt v. Johnston (9 C. A. 519)	161
Park v. Park (45 C. 347)	42, 74, 109
Patterson v. Brown Co. (3 C. A. 511)	152, 194
..... v. Ft. Lyon Co. (36 C. 175)	45
People v. Farmers High Line Co. (25 C. 202)	31, 83, 126, 157
..... v. Rogers (12 C. 278)	118
..... v. Farmers High Line Co. (25 C. 202)	32
Petterson v. Payne (43 C. 184)	58, 133, 134, 182, 185
Phelps v. Spruance (1 C. 414)	158
Platte Valley Co. v. Buckers Co. (25 C. 77)	56, 57, 58, 140, 182, 185
..... v. Central Trust Co. (32 C. 102)	33, 65, 67, 93
Platte Water Co. v. Northern Co. (12 C. 525)	42, 63, 64, 72
Presbyterian College v. Poole (25 C. 50)	43
Putnam v. Curtis (7 C. A. 437)	30, 33, 42, 48
Randall v. Rocky Ford Co. (29 C. 430)	52
Reservoir Co. Irrigating Co. (8 C. A. 237)	69, 183
Rio Grande Co. v. Prairie Co. (27 C. 225)	40, 48, 177
Ripley v. Park Center Co. (40 C. 129)	55, 56, 140
Roberson v. People (40 C. 119)	148, 180, 181
Rockwell v. Highland Co. (1 C. A. 396)	85
Rocky Ford Co. v. Simpson (5 C. A. 30)	80
Rollins v. Fearnley (45 C. 319)	42, 48, 188
Rominger v. Squires (9 C. 327)	70
S. B. & R. C. D. Co. v. Marfell (15 C. 303)	82, 83, 84, 88, 89
Saint v. Guerrerio (17 C. 448)	135, 159

	Page.
Schilling v. Rominger (4 C. 100)	67, 109
Schmidt v. Bank (10 C. A. 261)	161
Schneider v. Schneider (36 C. 518)	128, 130
..... v. People (30 C. 493)	148
Seven Lakes Co. v. New Loveland Co. (40 C. 382)	65, 66, 146
Sieber v. Frink (7 C. 148)	30, 31, 72
Smith Co. v. Colorado Ins. Co. (34 C. 485)	57, 124, 127, 184
Squire v. Livezey (36 C. 302)	180
Sterling Co. v. Downer (19 C. 595)	46, 142
Sterling v. Pawnee Co. (42 C. 421)	110, 158
..... v. (42 C. 421)	59, 69, 120, 193
Strang v. Osborn (42 C. 187)	90
Strickler v. Colorado Springs (18 C. 16)	57, 59, 64, 66, 72, 95, 96, 100, 115, 190
Supply Ditch Co. v. Elliott (10 C. 327)	78
Tanghenbaugh v. Clark (6 C. A. 235)	74, 82
Telluride v. Blair (33 C. 353)	60
Tew v. Powar (37 C. 292)	151
Thomas v. Guirand (6 C. 530)	70, 74
Travelers Ins. Co. v. Childs (25 C. 260)	101, 102, 105, 165
True v. Rocky Ford Co. (36 C. 43)	83
Tubbs v. Roberts (40 C. 498)	136, 158
Tucker v. Edwards (7 C. 209)	87
Upper Platte Co. v. Ft. Morgan Co. (27 C. 214)	51
Van Wagenen v. Carpenter (27 C. 444)	147
Vogel v. Minnesota Co. (47 C. 534)	71, 92, 93, 94, 95, 136, 192
Wadsworth Co. v. Brown (39 C. 57)	33, 46, 81, 92, 93, 94, 96, 97
Waterman v. Hughes (33 C. 270)	39, 45, 160
Water Co. v. Larimer & Weld Co. (25 C. 87)	76, 175, 186
..... v. (24 C. 322)	33, 37, 38, 68, 161
..... v. Tenney (24 C. 344)	150, 171
Wellington v. Beck (30 C. 409)	67
Wheeler v. Northern Co. (10 C. 582)	42, 65, 70, 79, 80, 81, 88, 114, 157, 189
White v. High Line Co. (22 C. 191)	47, 49, 85, 153
..... v. Nuckolls (49 C. 170)	31
Willson v. Ward (26 C. 39)	186
Windsor Co. v. Hoffman Co. (48 C. 82)	32, 60, 61, 92
..... v. Lake Supply Co. (44 C. 214)	52, 67, 69, 168, 170
Woods v. Sargent (43 C. 268)	47, 132
Wood v. Water Works Co. (20 C. 253)	154
Wright v. Platte Valley Co. (27 C. 322)	80, 83
Wyatt v. Irrigation Co. (18 C. 298)	72
..... v. Larimer & Weld Co. (18 C. 298)	32, 79, 86, 125, 126
X. Y. Irrigation Co. v. Buffalo Creek Irrigation Co. (25 C. 529)	40, 65
Yunker v. Nichols (1 C. 551)	65

Irrigation Law of Colorado

CHAPTER I.

ABANDONMENT.

Definition § 1.

Acquiescence § 2.

Elements § 3.

(a) Intention.

(b) Non-use.

Evidence § 4.

Ditch § 5.

Milling Priority § 6.

Mill-race § 7.

Repairs—Failure to make § 8.

Right to Water § 9.

Subsequent to decree § 10.

Use of Abandoned Water § 11.

What can be abandoned § 12.

When complete § 13.

Who may raise question § 14.

See Evidence, Secs. 178, 181a, 182b.

See Pleading and Practice, Sec. 209.

See Increased Flow, Sec. 198.

See Changing Point of Diversion, Sec. 116b.

See Reservoirs, Sec. 255.

Sec. 1. Definition.

“Abandonment is defined to be the relinquishment or surrender of rights or property by one person to another. Bouvier’s Law Dictionary.

“Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.” Web. Dict. *Nichols v. Lantz*, 9 Colo. App. 1-5, 47 Pac. 70; *Beaver Brook R. Co. v. St. Vrain R. Co.* 6 Colo. App. 130-136, 40 Pac. 1066.

Sec. 2. Acquiescence.

See Pleading and Practice, Secs. 223a, 229.

“The subsequent owners of the land interposed no ob-

jections to the appropriation of the water by Robbins, but, on the contrary, stood by and saw him construct his ditch, and permitted him for years to divert the water from the slough into it, without even notifying him of the prior appropriation. These facts amounted to a voluntary yielding up and waiver of the priority acquired by Foster, without any intention of resuming it, and constitute a clear case of abandonment." *Dorr v. Hammond*, 7 Colo. 79-83, 1 Pac. 693.

Sec. 3. Elements.

"Abandonment is made up of two elements, act and intention." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-143, 93 Pac. 1112; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175; *Putnam v. Curtis*, 7 Colo. App. 437-442, 43 Pac. 1056.

a. Intention.

See *Evidence*, Sec. 184.

1. "Abandonment is a matter of intention and operates instantaneously." *Derry v. Ross, et al.*, 5 Colo. 295; *Sieber, et al., v. Frink, et al.*, 7 Colo. 148, 2 Pac. 901; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Nichols v. Lantz*, 9 Colo. App. 1-5, 47 Pac. 70; *Beaver Brook R. Co. v. St. Vrain R. Co.*, 6 Colo. App. 130-136, 40 Pac. 1066; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-364, 40 Pac. 989; *Putnam v. Curtis*, 7 Colo. App. 437-442, 43 Pac. 1056; *Hall, et al., v. Lincoln, et al.*, 10 Colo. App. 360-364, 50 Pac. 1047.

2. "It must appear from the evidence that there was a leaving of the claim, without any intention of returning or making any further use of it. 36 Cal. 214." *Beaver Brook R. Co. v. St. Vrain R. Co.*, 6 Colo. App. 130-136, 40 Pac. 1066.

3. Intention to abandon is shown by "non-use and similar acts, before and after decree." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-148, 93 Pac. 1112.

4. "Non-use and similar acts, before and after the decree, directly bear on the element of intention of the owner in the failure to use what was awarded him." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-148, 93 Pac. 1112.

5. Intention for instance, is the very essence of abandonment. *Hall v. Lincoln*, 10 Colo. App., 360-364.

b. Non-use.

See Evidence, Sec. 178 b. See Easement, Sec. 168.

1. "Non-user alone, at least short of the period of the statute of limitations, is not sufficient to prove an abandonment, but non-use continued for a considerable length of time, coupled with other acts of a character tending to show an intention on the part of the owner not to resume, or repossess himself of the thing whose use he relinquished, may constitute an abandonment." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-143, 93 Pac. 1112; *People v. Farmers H. L. C. Co.*, 25 Colo. 202, 54 Pac. 626; *Cooper v. Shannon*, 36 Colo. 98-103, 85 Pac. 175.

White v. Nuckolls, 49 Colo. 170, 112 Pac. 329.

2. "A failure to use for a time is competent evidence on the question of abandonment; and if such non-user be continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs." *Sieber, et al. v. Frink*, 7 Colo. 148-154, 2 Pac. 901.

3. "But * * * a corporation may not divert water from a stream and make beneficial use of a portion thereof, and as to the residue so diverted never make any use whatever, for over twenty years from the time of the original diversion, for more than eighteen years from the time of an additional diversion, and for more than nine years after its right to the quantities thereby diverted have been judicially established, and then be heard to assert its claim to such excess after subsequent appropriators had continuously, adversely, openly and notoriously been enjoying the use thereof for such length of time." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-363, 40 Pac. 989.

4. "Non use, alone, is not sufficient evidence thereof." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-364, 40 Pac. 989.

5. Syl. "A perpetual right to the use of water from an irrigation ditch, acquired or reserved under a contract, constitutes an easement in the ditch, which cannot be lost by non-user alone short of the period of limitation for actions to recover real property." *People ex rel. Standard v. Farmers H. L. Co.*, 25 Colo. 202, 54 Pac. 626; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo., 298, 33 Pac. 144.

Sec. 4. Evidence.

See Evidence, Secs. 178-194.

Syl. "Abandonment is a matter of intention. It is peculiarly within the province of a trial court to determine from all the facts and circumstances of each particular case whether the abandonment has or has not taken place." *Cooper v. Shannon*, 36 Colo. 98-99, 85 Pac. 175.

Sec. 5. Ditch.

"A distinction must be observed between the abandonment of an irrigating ditch and the abandonment of the right to the use of water for irrigation. * * * * *"
Nichols v. McIntosh, 19 Colo. 22. 34 Pac. 278." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-364; 40 Pac 989; *Greer v. Heister*, 16 Colo. 306, 26 Pac. 770.

Sec. 6. Milling Priority.

"In case of abandonment of the milling priority, the water thus returned to the stream does not belong to senior appropriators, the headgates of whose ditches are situate on the stream above the point of discharge of water from the millrace into the river, but that the same belongs to appropriators from the stream below such point of discharge, in the order of their priority." *Cache la Poudre R. Co. v. Water S. & S. Co.*, 27 Colo. 532-536-537, 62 Pac. 420; *Cache la Poudre Irr. Co. v. Water S. & S. Co.* 25 Colo. 161-168, 53 Pac. 331; *Windsor Co. v. Hoffman Co.*, 48 Colo. 82-86-87. 109 Pac. 422.

Sec. 7. Millrace.

See Appropriation, Sec. 56b.

Sec. 8. Repairs—Failure to make.

"Failure * * * * to make repairs or contribute toward repairs upon the ditch * * * * would not alone prove abandonment; nor would the fact that for some years. . . . did not use her share of the water, and during one year used none at all, even if the non-user was voluntary with her, point in the direction of abandonment." *Butterfield v. O'Neill, et al.*, 19 Colo. App. 7-10, 72 Pac. 810; *Putnam v. Curtis*, 7 Colo. App. 437-443, 43 Pac. 1056.

Sec. 9. Right to water cannot be revived after abandonment.

Syl. "Upon abandonment of the construction of a proposed canal without intention of resuming, all incipient rights lapse and revert to the public; and are not thereafter capable of being sold or transferred." *Colo. L. & W. Co. v. Rocky Ford C. R. L. L. & T. Co.*, 3 Colo. App. 545, 34 Pac. 580.

Sec. 10. Subsequent to decree.

An abandonment, subsequent to a decree only, can be shown. The decree is *res adjudicata* as to the amount of water used prior thereto. *O'Brien v. King*, 41 Colo. 487-490, 92 Pac. 945; *Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. 391; *Water S. & S. Co. v. Larimer & Weld R. Co.*, 24 Colo. 322, 51 Pac. 496; *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540; *Wadsworth D. Co., et al., v. Brown* 39 Colo. 57-61, 88 Pac. 1060.

Sec. 11. Use of abandoned water.

"It has been determined, where an appropriation of water for a use that wholly absorbs it, as for irrigation, is abandoned and allowed to flow into the stream above the head-gates of all the ditches, or where the stream, from whatever cause, has

at such point received an increase in volume, the right to the use of the increased quantity is in accordance with the priorities of the several ditches. *Kinney on Irrigation*, Secs. 183, 259." *Cache la Poudre I. Co. v. Water S. & S. Co.*, 25 Colo. 161-169-170, 53 Pac. 331.

Although the above may be the rule of law under the particular state of facts of that case, yet, abandoned water may, under certain circumstances, be appropriated by junior appropriators.

It has been held that after water has been used by a mill-race and returned to the stream, thus in effect being abandoned, it cannot be appropriated by or purchased by senior appropriators above the point of diversion for the mill-race, but it can be appropriated by junior appropriators below. *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 161-170, 53 Pac. 331.

See Appropriation, Sec. 56.

See Sec. 6.

Sec. 12. What can be abandoned.

"On the contrary, the plaintiffs claim that the right to the use of water in dispute never belonged to them (the defendants). If it never existed it could not be abandoned." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-147, 93 Pac. 1112; *Conley et al. v. Dyer, et al.*, 43 Colo. 22-28, 95 Pac. 304; *Ditch Co. v. Ditch Co.*, 22 Colo. 115-120, 43 Pac. 540; *Crawford C. D. Co. v. Needle & R. D. Co.*, 49 Colo. 362, 114 Pac. 655.

"The term, (abandonment) can apply only to completed appropriations of water. To abandon a water right presupposes possession thereof prior, and to, the time of abandonment." *Drach v. Isola*, 48 Colo. 134, 145, 109 Pac. 748

Sec. 13. When complete.

See Sec. 4.

It was held in *Beaver D. R. Co. v. St. Vrain R. Co.*, 6 Colo. App. 130, 40 Pac. 1066, that an abandonment was not

complete until an appropriation of the abandoned water had been made.

Sec. 14. Who may raise question.

See State Officers, Sec. 278.

CHAPTER II.

ADJUDICATION.

Capacity of Canal—Calculation § 15.

- (a) Decree—Res adjudicata.
- (b) Kutter's Formula.
- (c) Res Adjudicata—Collateral Attack.

Decrees § 16.

- (a) Appeals.
- (b) Conditional.
- (c) Effect of decree.
- (d) Failing to number ditches.
- (e) For an additional appropriation.
- (f) For excessive quantity.
- (g) Review and rehearing.
- (h) Pleading.
- (i) Void—Setting aside.
- (j) What is decreed.
- (k) When may be attacked—conditional.
- (l) Obstructions in stream.

Determining amount of water—Acres considered § 17.

Distribution under decree § 18.

Duties of ditch owner in adjudication § 19.

Effect of adjudication § 20.

For domestic mining or milling purposes § 21.

Jurisdiction of court in adjudication proceeding § 22.

Limitation of actions for adjudication § 23.

- (a) As to proceeding after the Statute has run.
- (b) Four years.
- (c) Two years.
- (d) Parties affected.
- (e) Laches.
- (f) Re-argument or review.
- (g) Sale of excess rights.

Nature of adjudication § 24.

- (a) Proceeding in rem.
- (b) Quieting title.
- (c) Sul Generis.

Notice § 25.

- (a) Change of point of diversion.

District No. 10 § 26.

Part of district § 27.

Police power § 28.

(a) Statutes.

(b) Regulation—Not destruction.

Referees findings § 29.

(a) On appeal.

(b) Change by court.

Relation back § 30.

Rights of consumers from a ditch § 31.

See Estoppel. See Pleading and Practice.

Sec. 15. Capacity of canal—Calculation.

a. Decree—Res adjudicata.

"When * * * * the decree was entered, the computation of the court was made under a test, or formula, then in general use in this state and * * * * recognized as the most accurate then employed; * * * * said computation on that basis is correct." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 24 Colo. 322-325, 51 Pac. 496.

See Res Adjudicata, Sec. 265.

b. Kutter's Formula.

"If we should now correct the decree * * * * then at the end of the next decade there may be evolved a new method of determining the carrying capacity of ditches giving even more accurate results than under the Kutter formula, and in an action then brought to correct the mistake made by us now in applying the Kutter test, the court must set aside our decree and enter a new one, and so there would be no end to the litigation, provided new and more accurate tests are discovered. * * * * 81 Fed. Rep. 73, 116." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 24 Colo. 332-335, 51 Pac. 496.

"* * * * n represents the coefficient of roughness. Without going into this technical and scientific subject at any length, it is sufficient merely to say that the mathematical value of this element varies with different conditions from

.010 to .035. The formula is confessedly empirical and not strictly scientific; it has not been adopted by our statutes or by the courts as a rule of evidence, or as the exclusive test for ascertaining the carrying capacity of ditches." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 24 Colo. 322-330-331, 51 Pac. 496.

c. Res adjudicata—Collateral attack.

"The present action (a collateral attack upon a decree) can not be allowed to usurp the function of an appeal or writ of error, and thus secure a correction or reformation of the decree, because of some erroneous calculation of the district court. If a mistake was made by the court in computing the capacity of the ditch, such a mistake cannot be corrected in this proceeding. The capacity is *res adjudicata* * * * *." *Water S. & S. Co. v. Larimer & Weld I Co.*, 24 Colo. 322-330, 51 Pac. 496.

Sec. 16. Decrees.

a. Appeals.

See Appeals, Sec's. 32, 44.

b. Conditional.

Where a conditional decree is entered allowing one a certain amount of water if beneficially applied with due diligence, and a subsequent decree is entered, wherein it is found that due diligence was exercised and a certain amount was decreed, the latter decree supplements the former and the two taken together constitute the decree in the case. *Water S. & S. Co. v. Larimer & Weld I Co.*, 24 Colo. 322, 51 Pac. 496.

Crawford C. D. Co. v. Needle R. Co., 49 Colo. 362, 114 Pac. 655.

Syl. "A conditional decree entered in an adjudication of water rights is erroneous, but it is not void so as to be subject to collateral attack." *Lake Fork D. Co. v. Haley, et al.*,

28 Colo. 513, 67 Pac. 158; *See Drach v. Isola*, 48 Colo. 134-143, 109 Pac. 748.

No definite amount of water can be given to a ditch before its completion.

The date of the priority of a ditch, begun but not completed at the time of the entry of the decree, may be fixed. *Waterman v. Hughes, et al.*, 33 Colo. 270-277, 80 Pac. 891.

The better practice is to withhold all elements of the decree until it can be made final. *Id.*, 277.

A conditional decree may properly be entered and afterwards, upon additional proof, made final. *Id.* 281.

c. Effect of decree.

"The decrees rendered thereunder (statutes) do not purport to grant any new property right, but rather embody in a permanent form the evidence of those previously acquired." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-361, 40 Pac. 989.

"The decree, being, as is a deed, merely one kind of evidence of a right to the thing owned." *Id.* 366.

A decree determines the relative rights between ditches and between consumers under one ditch and consumers under another ditch. *Cambs, et al., v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-429, 88 Pac. 396.

Before the statute has run, the decrees are only *prima facie* evidence. *Ft. Lyon C. Co., et al., v. Ark. V. S. B. & I. L. Co., et al.*, 39 Colo., 332, 90 Pac. 1023; *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267, 60 Pac. 629.

d. Failing to number ditches.

Syl. "The failure of a decree to number the ditches as required by statute is merely an irregularity and does not make the decree void so as to be subject to collateral attack." *Lake Fork D. Co. v. Haley, et al.*, 28 Colo. 513, 67 Pac. 158.

e. For an additional appropriation.

A decree can not be opened, or another decree entered, and grant to those who subsequent to the decree had made additional appropriations under a ditch formerly adjudicated, priorities relating back to the beginning of the construction of the ditch. Such an action would defraud intervening appropriators. *Farmers U. D. Co. v. Rio Grande C. Co., et al.*, 37 Colo. 512-516, 86 Pac. 324; *Rio Grande C. Co., et al.*, 37 *Prairie D. Co.*, 27 Colo. 225, 60 Pac. 726.

The above doctrine does not apply to conditional decrees. *Farmers U. D. Co. v. Rio Grande C. Co., et al.*, 37 Colo. 512-518, 86 Pac. 324.

f. For excessive quantity.

"* * * * No claimant of any of the priorities therein established (by decree) can maintain a claim to an excessive quantity of water." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-363, 40 Pac. 989.

g. Review and rehearing.

See Secs. 271-277.

h. Pleading.

See Pleading and Practice, Sec. 212.

i. Void—Setting aside.

See Pleading and Practice, Sec. 224.

"A void decree adjudicating priority of water rights may, at the suit of one having a later decreed priority, be set aside and its enforcement restrained as to all consumers of water having adjudicated priorities affected thereby." *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-448. 76 Pac. 794. The foregoing is the rule although such "other parties" are not parties to such suit and complaining of the void decree.

j. What is decreed.

"While it is true that the priority decree is awarded to the ditch or ditch company which carries the water, yet in

reality the thing decreed is a completed appropriation." *Combs, et al. v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-429, 88 Pac. 396.

k. When may be attacked—Conditional.

It is certainly not an attack on the decree to inquire and ascertain whether the condition precedent to rights therein named, have been complied with in apt time, or at all.

Drach v. Isola, 48 Colo. 134-144, 109 Pac. 748.

"The law will not permit defendants, after a lapse of fifteen years from the date of the decree, and twenty-three years after the construction of their ditch, to perfect a contingent or inchoate right to make further appropriations, and thereby take away plaintiffs' vested rights previously acquired under the same or like decree." *Id.*, 145.

"If, on the other hand, the decrees of 1889 be conditional, this is a procedure in which the completed appropriations may be ascertained, and the vested rights of plaintiffs protected." *Id.*, 141.

l. Obstructions in stream.

"The provision in this decree should enjoin the appellant from making, constructing or building any obstruction in the bed of the river in the vicinity of the headgate of said mill ditch as originally located, which shall damage or seriously endanger the lands or property of defendant * * * *."

Crisman v. Heiderer, 5 Colo. 589-598.

Sec. 17. Determining the amount of water—Acres considered.

The number of acres, which have been irrigated, are taken into consideration in determining the amount of water to which a ditch is entitled. *Bates v. Hall*, 44 Colo. 360-368, 98 Pac. 3.

Sec. 18. Distribution under decree.

Distribution must be made in accordance with the decrees of priority determined on adjudication, and not other-

wise. *Combs, et al., v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-432, 88 Pac. 396. See *Distribution*, Sec. 147.

See *Irrigation District*, Sec. 205.

Sec. 19 Duty of ditch owners in re adjudication.

In an adjudication proceeding it is the duty of the ditch company to appear and represent its consumers. *Combs, et al., v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-432, 88 Pac. 396; *Wheeler v. Northern C. I. Co.*, 10 Colo. 582-592, 17 Pac. 487; *Farmers H. L. C. Co. v. Southworth*, 13 Colo. 111-121, 21 Pac. 1028; *Canal Co. v. Loutsenheizer*, 23 Colo. 233-235, 48 Pac. 532.

Sec. 20. Effect of adjudication.

An adjudication is *res adjudicata* as to the parties thereto. See *Pleading and Practice*. See *Res Adjudicata*, Sec. 266. *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573-579, 108 Pac. 755; *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540; *Louden C. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. 535; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989; *Canal Co. v. Loutsenheizer D. Co.*, 23 Colo. 233, 48 Pac. 233; *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447, 76 Pac. 794.

The rights determined by an adjudication are those pertaining to the ditches and not the rights of the individual consumers under the ditches. *Rollins v. Fearnley*, 45 Colo. 319-325, 101 Pac. 345; *Combs, et al., v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-427, 88 Pac. 396; *Putnam v. Curtis*, 7 Colo. App. 437-440, 43 Pac. 1056; *Park v. Park*, 45 Colo. 347.

Sec. 21. For domestic mining or milling purposes.

"The proceedings under said acts (of 1879 and 1881) are purely statutory, and can not be resorted to for the purpose of determining the claims of parties to the use of water for domestic or other purposes not fairly included within the meaning of the term 'irrigation.'" *Platte W. Co. v. Northern Colo. I. Co.*, 12 Colo. 525-529, 31 Pac. 901.

Sec. 22. Jurisdiction of court in adjudication proceeding.

Syl. "Where a district court properly obtains jurisdiction and proceeds under the statute to adjudicate the priorities of water rights in a water district and enters a decree awarding priorities, its jurisdiction is exclusive, and as between parties to such decree another district court has no jurisdiction in an ordinary civil action to review such decree or to pass upon questions of priority to the use of water between the parties thereto, and a judgment by another court attempting such review or to pass upon questions settled by such decree is void and may not be pleaded as *res adjudicata* in a subsequent action involving the same question in the court having jurisdiction." *Con. Home S. D. & R. Co. v. New Loveland & G. I. & L. Co.*, 27 Colo. 521 62 Pac. 364; *Louden C. Co. v. Handy D. Co.* 22 Colo. 102, 43 Pac. 535; *Canal Co. v. Loutsenheizer*, 23 Colo. 233, 48 Pac. 532.

Where a stream flows in two counties, the district court of the county first obtaining jurisdiction shall maintain it, and it shall be exclusive. *Presbyterian College v. Poole*, 25 Colo. 50; *Louden C. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. 535.

Sec. 23. Limitation of actions for adjudication.

See Res Adjudicata, Secs. 265-270.

See Review and Rehearing, Sec. 271.

a. As to proceeding after the statute has run.

See Pleading and Practice, Sec. 222d.

See Vested Rights.

b. Four years.

Syl. "A decree in a proceeding under the irrigation acts cannot, in the absence of fraud, be reopened by a party thereto after the lapse of four years." *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540.

c. Two years.

"A party to the statutory proceeding, even though he offers no proof in support of the claim which he files, is bound by the provisions of the decree unless within the two years' period of limitation he applies for a review." *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-460, 76 Pac. 794; *Greer v. Heiser*, 16 Colo. 306, 26 Pac. 770; *Canal Co. v. Loutsenheizer D. Co.*, 23 Colo. 233, 48 Pac. 532; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Loudon C. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. 535; *Handy D. Co. v. South Side D. Co., et al.*, 26 Colo. 333, 55 Pac. 30.

d. Parties affected.

"All persons are forever barred from setting up any claim adverse to its (the adjudication) effect." *Broad Run C. Co. v. Deuel & Synder Co.*, 47 Colo. 573-580, 108 Pac. 755.

In the above cited case, the date of the priority claimed was of the year 1881, which was subsequent to the statute of 1879. It is not held that claimants of rights, which vested prior to the adoption of the constitution and passage of the statutes, should not be protected. The above case modifies *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278, and *Greer v. Heiser*, 16 Colo. 306, 26 Pac. 770.

See Pleading and Practice—Res Adjudicata.

The statute is held to apply to those situated in different districts, although taking water from the same stream, and who were not parties to the adjudication, and were not in the district. *Ft. Lyon C. Co., et al., v. The S. B. & I. L. Co., et al.*, 39 Colo. 332, 90 Pac. 1023.

Syl. "The right to bring an independent action to establish priority to the use of water within four years after a statutory adjudication has been had, as permitted by section 2434 Mills * * * may be exercised only by those who were not parties to the proceeding, or, if parties thereto, whose right of action grows out of matters arising subsequent to the decree." *Canal Co. v. Loutsenheizer*, 23 Colo. 233; 48 Pac.

532. Modified by *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573, 108 Pac. 755.

e. Laches.

That which will excuse laches will not affect the statute of limitations. *Patterson v. Ft. Lyon C. Co., et al.*, 36 Colo. 175-180, 84 Pac. 807.

A claim, that the holders of excess rights were trespassers and for that reason the statute should not run, is untenable. *Id.* 180.

f. Re-argument or review.

"No re-argument or review, either with or without any additional evidence, of any decree made under the provisions of the irrigation act can be had by one who was a party, unless applied for within two years from the time of its entry." *Waterman v. Hughes, et al.*, 33 Colo. 270-275, 80 Pac. 891.

See Pleading and Practice.

See Review and Rehearing.

g. Sale of excess rights.

See Canal Companies, Sec. 93b.

The statute of limitations, that "bills of relief * * * in all other cases not herein provided for shall be filed within five years after the cause thereof shall accrue, and not after," begins to run against actions to determine and cancel rights to excess water or to cancel the sale of rights in excess of the carrying capacity of a ditch, on the date of the sale of such excess rights. Another action in court pending and undisposed of does not stop the running of the statute during such pendency. *Patterson v. Ft. Lyon C. Co., et al.*, 36 Colo. 175-178, 84 Pac. 807.

The statute of limitations will run against actions to cancel the sale of excess rights.

Sec. 24. Nature of adjudication.

a. Proceeding in rem.

An adjudication is a proceeding *in rem*. *Louden C. Co.*

v. Handy D. Co., 22 Colo. 102, 43 Pac. 535; *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573-579, 108 Pac. 755.

b. Quieting title.

"It is manifest * * * * that our proceeding, if not technically one to quiet title, is quite analogous thereto, for the object is not merely to settle the individual and several priorities of different appropriators, but the relative priorities as between the different ditches, in which every claimant is seeking to establish his right as against every other person." *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-457, 76 Pac. 794.

c. Sui generis.

Syl. "The statutory proceeding to adjudicate priorities of right to the use of water is not an ordinary civil action or proceeding; it is a proceeding *sui generis*, to which the rules governing ordinary civil actions are not always applicable." *Sterling I. Co. v. Downer*, 19 Colo. 595, 36 Pac. 787.

Sec. 25. Notice.

Publication of notice of adjudication suffices to make all claimants parties. *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573-581, 108 Pac. 755.

"Our conclusion, therefore, * * * * is that whether petitioner was or was not a party to the original proceeding, it is bound." *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573-582, 108 Pac. 755.

a. Change of point of diversion.

In an application to change the point of diversion, notice need be published only in the county in which the district court, first obtaining jurisdiction, sits. The trial court may properly order publication in other counties but the statute does not require it to be done. *Wadsworth D. Co., et al., v. Brown*, 39 Colo. 57-67, 88 Pac. 1060.

Sec. 26. District No. 10.

The adjudication had in District No. 10 is confirmed. *Broadmoor S. Co. v. Brookside W. Co.*, 24 Colo. 541-544, 52 Pac. 792.

Sec. 27. Part of district.

An adjudication of a part only of a district may be had and an adjudication may be had of a tributary of a stream without making appropriators from the main stream, or from other streams in the district, parties. *Woods v. Sargent, et al.*, 43 Colo. 268-289, 95 Pac. 932.

Sec. 28. Police power.**a Statutes.**

The adjudication statutes confer the right to the exercise of the police power of the state. *Broad Run Co. v. Deuel & Synder Co.*, 47 Colo. 573-579, 108 Pac. 755.

b. Regulation—Not destruction.

Under the theory of "police power" the legislature can regulate the distribution of water but it can not destroy the right to its use. *White v. High Line C. Co.*, 22 Colo. 191-198, 43 Pac. 1028.

Sec. 29. Referees findings.**a. On appeal.**

"The findings of a referee are not binding on an appellate court in the sense they would be if the trial judge, whose judgment is reviewed, had seen the witnesses, and heard them testify." *La Jara C. & L. S. Assn. v. Hansen*, 35 Colo. 105-110, 83 Pac. 644.

b. Change by court.

Syl. "Where a referee in a proceeding to adjudicate priorities to the use of water for irrigation, who heard the

witnesses, recommended an award of.....to a ditch which the court reduced * * * * and it does not appear why the court made the change and the evidence is too indefinite to enable the supreme court to determine from it the quantity of water which the ditch should have, the cause will be reversed and remanded to the trial court to proceed upon the evidence before it, together with such other evidence as may be offered, to determine the quantity of water, the ditch is entitled to." *Lamson, et al., v. Vailes, et al.*, 27 Colo. 201, 61 Pac. 231.

Sec. 30. Relation back.

See Sec. 76.

The doctrine of relation back is not affected by the map and statement statute, which is declared to be unconstitutional. *Rio Grande L. & C. Co., v. Prairie D. Co.*, 27 Colo. 225-233, 60 Pac. 726.

Sec. 31. Rights of consumers from ditch.

If, in an adjudication proceeding, the court, before whom all necessary parties are, should determine the rights of consumers under a ditch, would such determination be effectual? *See Rollins v. Furnley*, 45 Colo. 319-324, 101 Pac. 345; *Contra, Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. 854; *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. 317; *Evans v. Swan, et al.*, 38 Colo. 92, 88 Pac. 149; *O'Neill, et al., v. Ft. Lyon C. Co., et al.*, 39 Colo. 487, 90 Pac. 849.

See Priorities.

CHAPTER III.

APPEALS.

Affidavits—Bill of exceptions § 32.

Bill of exceptions lacking § 33.

From State Supreme Court to U. S. Supreme Court § 34.

(a) Grounds for a certificate for an appeal.

(b) Question must be raised in State Court before judgment.

Limitation on appeals § 35.

Method of taking appeals § 36.

(a) Statutory.

(b) Ex Parte.

(c) Time.

Parties entitled to an appeal § 37.

(a) Those representing a ditch.

(b) Consumers.

Prejudicial error—Presumption on appeal § 38.

Public Policy § 39.

Remand for new trial—Res adjudicata § 40.

Rehearing and review does not waive right to appeal § 41.

Time for filing transcript § 42.

Transcript—Certification § 43.

Verification of statement for an appeal § 44.

Sec. 32. Bill of exceptions.

Syl. "On an appeal from a decree adjudicating water rights, in order to have considered affidavits filed by appellants in support of petitions for review, such affidavits must be incorporated in a bill of exception, signed and sealed by the trial judge." *Daum, et al. v. Conley, et al.*, 27 Colo 56-57, 59 Pac. 753.

Sec. 33. Bill of exceptions lacking.

"If appellants have no bill of exceptions, or have preserved no exception to the judgment, they would still have the right to have such matters determined as might be pre-

sented by the record proper." *Daum, et al., v. Conley, et al.*, 27 Colo. 56-61, 59 Pac. 753.

Sec. 34. From State Supreme Court to U. S. Supreme Court.

a. Grounds for a certificate for an appeal.

"Inasmuch as they made their appropriation of water in accordance with the provisions of the statute in question, and relying upon the same as valid, incurred expenses, and made investments upon the strength of it, and since the legislative and executive departments of the state have recognized its validity since its passage, the appellees have acquired a vested right to their appropriation which, after it was so perfected, it is as much beyond the power of this court, as it would be of the legislature to destroy; and that, if the decision in this case holding unconstitutional the statute should now be applied to them, the practical effect would be to impair the obligation of a contract between appellees and the state which was virtually entered into when appellees made their appropriation upon the faith of the validity of the law." *Lamar C. Co. v. Amity L. & I. Co., et al.*, 26 Colo. 370, 378-379, 58 Pac. 600.

"In passing it is pertinent to remark that the Supreme Court of the United States has held that to 'come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state and not by a decision of its judicial department only.' * * * 159 U. S. 103." *Lamar C. Co. v. Amity L. & I. Co., et al.*, 26 Colo. 370-379, 58 Pac. 600.

b. Question must be raised in state court before judgment.

The federal question must be raised in the state courts before judgment.

"For when, in the state court, 'the federal question is

suggested for the first time in a petition for rehearing after judgment, it is not properly raised, so as to authorize the supreme court of the United States to review the decisions of the highest court of the state.' * * * * 148 U. S. 682; * * 137 U. S. 48; * * 138 U. S. 52; * * 139 U. S. 462." *Lamar C. Co. v. Amity L. & I. Co., et al.*, 26 Colo. 370-380, 58 Pac. 600.

Sec. 35. Limitation on appeals.

Syl. "An appeal may be taken within two years from the time a decree is rendered in such proceeding, but not afterwards." *Upper Platte & B. C. Co. v. Ft. Morgan R. & I. Co., et al.*, 27 Colo. 214, 60 Pac. 489.

Sec. 36. Method of taking appeals.

a. Statutory.

The method of taking appeals is regulated by Sec. 2427 Mills. *Daum, et al., v. Conley, et al.*, 27 Colo. 56-60, 59 Pac. 753; *Upper Platte & B. C. Co. v. Ft. Morgan R. & I. Co.*, 27 Colo. 214, 60 Pac. 484; *Napier v. Glenwood*, 49 Colo. 208, 112 Pac. 323.

Sec. 2427 Mills above cited is Sec. 3307 herein.

b. Ex Parte.

"On the presentation of a statement by those desiring an appeal, if the court or judge finds it fulfills the requirements, an order is made allowing it, and fixing the amount of the appeal bond." *Daum, et al., v. Conley, et al.*, 27 Colo. 56-60, 59 Pac. 753.

c. Time.

The giving of time, in which to perfect an appeal, by a referee, is of no effect. *Daum, et al., v. Conley, et al.*, 27 Colo. 56-60, 59 Pac. 753.

Sec. 37. Parties entitled to an appeal.**a. Those representing a ditch.**

"This provision (Sec. 3307 *infra*) does not contemplate that anyone interested in a ditch to which an award has been made, may have an appeal, but that the party or parties representing such ditch may exercise that right. The party representing a ditch means the owner or one controlling it, and not the different consumers." *Randall, et al., v. Rocky Ford D. Co., et al.*, 29 Colo. 430-432, 68 Pac. 240.

b. Consumers.

The consumers might be allowed to appeal in case fraud, in the adjudication proceedings on the part of the owner, could be shown. *Randall, et al., v. Rocky Ford D. Co., et al.*, 29 Colo. 430-433, 68 Pac. 240.

Sec. 38. Prejudicial error—Presumption on appeal.

Syl. "An error must be prejudicial to justify the reversal of a judgment, but an error is presumed to be prejudicial to the party against whom it is made, unless it affirmatively appears that it was harmless." *Buckers I. M. & I. Co. v. Platte Valley I. Co.*, 28 Colo. 187-188, 63 Pac. 305.

Sec. 39. Public policy.

Errors of record have been considered by the Supreme Court on appeal, although not urged by the parties, on the ground of public policy. *Windsor Co. v. Lake Supply Co.*, 44 Colo. 214-216, 98 Pac. 729.

Sec. 40. Remand for new trial—Res Adjudicata.

Where a cause has been remanded for a new trial "no finding of fact made by the lower court on the former trial, or which the Appellate Court said was supported by the evidence, was *res judicata* of any fact upon which the rights of the parties to the waters of such stream depended." *Buck-*

ers I. M. & I. Co. v. Platte Valley I. Co., 28 Colo. 187, 63 Pac. 305.

Sec. 41. Rehearing and review does not waive right to appeal.

"Appellants, by availing themselves of the provisions of (Sec. 3318 C. S. A.) * * * * in applying for a rehearing and review of the decree, have not waived their right to an appeal." *Daum, et al., v. Conley, et al.*, 27 Colo. 56-61, 59 Pac. 753.

An appeal is from a decree and not from an order denying a review.

Sec. 42. Time for filing transcript.

"The period within which appellants were required to lodge their transcript of record with the clerk of this court would begin with the date their appeal was granted. * * * * " *Daum, et al., v. Conley, et al.*, 27 Colo. 56-60, 59 Pac. 753.

Sec. 43. Transcript—Certification.

"It is clear, however, that the transcript of the evidence heard below must be certified as containing all the evidence in any manner affecting the ditches named in the order allowing the appeal, and that a certificate to that effect must be signed and sealed by the trial judge." *Kerr v. Dudley, et al.*, 26 Colo. 457-459, 58 Pac. 610.

Sec. 44. Verification of statement for an appeal.

"The statement is verified by two counsel for appellants, who state that the allegations therein are true of their own knowledge, and they make the verification on behalf of their respective clients, because they are more familiar with the facts than they are. This showing is sufficient." *Daum, et al., v. Conley, et al.*, 27 Colo. 56-61, 59 Pac. 753.

CAPTER IV.
APPROPRIATION.

Artificial Waters § 45.

Waters from mines § 46.

Water from springs § 47.

(a) Right to.

Abandoned water § 48.

Seepage, percolating or drainage water § 49.

Surface or waste water at terminus of ditch § 50.

Additional flow—Tunnel § 51.

Water from tributaries § 52.

(a) What is considered as a tributary.

Holder of option to purchase land § 53.

For cities and towns § 54.

For domestic use § 55.

(a) Priority.

Milling purposes § 56.

(a) Right to sell appropriation.

(b) Subsequent appropriation, of returned water for irrigation.

Reservoirs § 57.

Speculative purposes—Allowed but limited § 58.

From canon, not a running stream § 59.

In Colorado for use in New Mexico § 60.

On public land § 61.

Act of Congress recognizing appropriations § 62.

(a) Vested rights.

(b) Act construed.

(c) Recognition of existing rights.

Act of territorial legislature § 63.

Constitution regarding appropriation § 64.

(a) Construed.

Amount appropriated—Limited § 65.

Beneficial use of water appropriated § 66.

(a) Most important factor.

(b) Decree—Referee's findings.

(c) Excessive diversion is not to beneficial use.

Change of purpose of use § 67.

Change of character and method of use § 68.

Double Duty § 69.

Enlarged use § 70.

(a) Defined.

(b) In general.

(c) Proof.

"First in Time First in Right" § 71.

Fish lake § 72.

Flood and surplus water may be appropriated § 73.

Headgate—Tapping canal § 74.

Intent to appropriate § 75.

Map and statement act § 76.

(a) Statements.

Place of use § 77.

Priority § 78.

(a) How acquired.

(b) Measure of.

(c) To ditches.

(d) Different—from same ditch.

(e) Mode of diversion—Unimportant.

(f) Ownership, distinguished from ownership of stock in a corporation.

Returned waters—Sufficient to satisfy appropriation § 79.

Riparian rights—Distinguished from constitutional and statutory rights § 80.

Right to water appropriated is a freehold estate § 81.

Same quantity may be appropriated for use at different times § 82.

Senior appropriators cannot enlarge rights to injury of junior appropriators § 83.

Tenants in common § 84.

Title to land on which water is used is not necessarily in the appropriator § 85.

What does not constitute an appropriation § 86.

(a) A mere diversion.

(b) A grant.

(c) An enlargement of a ditch.

(d) Use by permission.

(e) Use during high water.

Waste waters—Appropriation of § 87.

(a) Excess water flowing on surface of land.

(b) From ditch.

(c) From tunnel.

(d) Return to stream.

Sec. 45. Artificial waters.

An appropriation of artificial waters, such as waters derived from the drainage of a mine, can be made. *Ripley, et al.*,

v. Park Center L. & W. Co., 40 Colo. 129, 130, 90 Pac. 75; *Platte Volley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77, 53 Pac. 334; Colo. Stat. Anno., Sec. 4231.

Sec. 46. Waters from mines.

See Sec's. 51, 87c.

"It is not necessary to rest the judgment solely, or at all, on petitioner's contract right with the owners of the mines which purported to grant it, as against all others, the right to collect and take this water at the portal of the tunnel; for the court found that the petitioner not only conducted this artificial water into the natural stream with the intention there to appropriate it, but also there actually made the first appropriation thereof after it reached the same. Our statute has made such water the subject of appropriation * * * (Colo. Stat. Anno., Sec. 4231). We have held that such contributions to a natural stream belong to the one who made them." *Ripley v. Park Center L. & W. Co.*, 40 Colo. 129, 133.

Sec. 47. Waters from springs.

"It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of a creek to say that later appropriators could lawfully acquire rights to the springs which constitute the source of the creek, simply because the means by which the waters are conveyed by the springs to the creek are subterranean and not well understood." *Clark, et al., v. Ashley, et al.*, 34 Colo. 285-290, 82 Pac. 447; *Bruening v. Dorr*, 23 Colo. 195, 47 Pac. 290.

"It was upon the theory that the springs were one of the sources of * * * creek that the court denied the defendants the right to use the water therefrom when such use interfered with prior appropriations." *Clark, et al., v. Ashley, et al.*, 34 Colo. 285-290, 82 Pac. 588.

a. Right to.

"The law, under the facts, makes these waters, arising as they do on defendant's * * * land, whether they be arti-

ficially collected percolating waters, or the waters of a natural flowing stream or spring, his property, as against the plaintiff in this case, unless the latter has acquired them in some way known to the law." *Smith C. & D. Co. v. Colo. I. & S. Co.*, 34 Colo. 485-489, 82 Pac. 588.

Sec. 48. Abandoned water.

See Abandonment, Sec. 13, 6.

Sec. 49. Seepage, percolating or drainage water.

See Subterranean Waters, Sec. 285.

Ogilve I. & L. Co. v. Insinger, 19 Colo. App. 380-387, 75 Pac. 598.

Sec. 50. Surface or waste water at terminus of ditch.

See Sec. 87.

Sec. 51. Additional flow—Tunnel.

See Sec. 46.

One who has no interest in a tunnel cannot appropriate the particular volume of water flowing from the tunnel after it has reached the river and becomes a part of the stream. It then inures to the benefit of all taking water from the stream. *Farmers' Union D. Co. v. Rio Grande C. Co., et al.*, 37 Colo. 512-521, 86 Pac. 1042; *La Jara C. & L. S. A. v. Hansen*, 35 Colo. 105, 83 Pac. 644.

Sec. 52. Water from tributaries.

See Evidence, Sec. 181e. See Adjudication, Sec. 27.

"The water of the tributaries of a natural stream can not be appropriated to the injury of prior appropriations from the main stream." *Ind. D. Co. v. Ag. D. Co.*, 22 Colo. 513-521, 45 Pac. 444; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 20 Pac. 313; *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77, 53 Pac. 334.

If a junior appropriator attempts to divert water from a tributary, and claims it, on the ground that if the water so appropriated was left in the stream, it would not reach the head-gate of the senior appropriator, the burden of proof is upon the junior appropriator. "The presumption is that the water of a tributary of a stream, less the evaporation, if not interfered with, will naturally reach the main stream either by surface or subterranean flow." *Petterson v. Payne Water Com., et al.*, 43 Colo. 184-186.

"The doctrine (set forth above) is applicable to the subsequent appropriation of water from a tributary which enters the main stream below the point where the prior appropriator makes his diversion when the result of such appropriation from the tributary is to require the prior appropriator to surrender the right to additional water for the purpose of supplying appropriations senior to his below the point where such tributary joins the main stream." *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77-83, 53 Pac. 334, overruling 7 Colo. App. 225, 42 Pac. 1020.

a. What is considered as a tributary.

"In the sense of contributing to the water supply of the river, the above enumerated waters(waste, seepage, sewerage, percolating, etc.) were tributary to said supply." *Ogilvy I. & L. Co. v. Insinger*, 19 Colo. App. 380-385.

Sec. 53. Holder of option to purchase land.

A party who took an option to purchase certain mining property, constructed a pipe-line and completed an appropriation of water. Held, that at the expiration of the option title to the pipe line and water did not go to the party giving the option. Such matters are controlled by the construction of contracts between the parties. *Nesmith v. Martin*, 32 Colo. 77, 75 Pac. 391.

Sec. 54. For cities and towns.

"That a city or town can not take water for domestic purposes which has been previously appropriated for some

other beneficial purpose, without fully compensating the owner, is so clear that further discussion seems almost unnecessary." *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-427, 94 Pac. 339.

Because an appropriation is not made until after the passage of the statute regarding condemnation (Sec. 6525 Colo. Stat. Anno.) a city or town is not relieved of the duty to properly compensate prior appropriators. *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-426, 94 Pac. 339.

Sec. 55. For domestic use.

The right to water for domestic use is the right of the riparian owner to take water for himself, his family or his stock but it can not be exercised to the detriment of prior appropriators by permitting a diversion through a long canal to points remote from the stream to supply such domestic needs, without compensating prior appropriators. *Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. 532; *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-428, 94 Pac. 339; *Broadmoor S. Co. v. Brookside W. Co.*, 24 Colo. 541-546, 52 Pac. 792.

a. Priority.

Water for domestic use is given a priority over other uses, but only in small quantities, and such priority does not attach to large canals for diversion for cities or towns. *Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233-237, 48 Pac. 532; *Broadmoor S. Co. v. Brookside W. Co.*, 24 Colo. 541-546, 52 Pac. 792; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313.

Sec. 56. Milling purposes.

See Abandonment, Sec. 6. See Reservoirs, Sec. 262.

See Vested Rights Sec. 300.

"The fact that, by reason of climatic conditions, the volume of water in a stream is sufficient to furnish power to run a mill only during certain portions of the year, does not

of itself limit an appropriation of water for milling purposes to such periods of time, but whenever the flow in the stream is sufficient for the use for which the appropriation is made, it is available." *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. 1053.

a. Right to sell appropriation.

"Referring briefly to the question of the right of the owner of the Mason and Hottel Millrace appropriation, * * * to sell the same to one diverting it above the tail of its millrace, * * * it is proper to say that, as against a vested right of a user and appropriator of this particular water, below the tailrace of the old mill appropriation, the owner of the Mason and Hottel millrace right cannot in any wise lawfully dispose of that right to another, to be applied to a new and different use, either above the tail of the mill-race, or at any other point on the stream, so as to adversely interfere with or injuriously affect the vested right of such other appropriator. In short, the relative rights to the use of this particular water depend upon and must be governed by the doctrine of prior beneficial use and appropriation thereof, both as to the volume of use and the length of time for which use has been made of it, all parties being limited, both in point of time of use and volume, by the facts of each particular case." *Windsor Co. v. Hoffman Co.*, 48 Colo. 82-88, 109 Pac. 422.

b. Subsequent appropriation, of returned water, for irrigation.

Syl. "Water appropriated for the operation of a mill may be the subject of a subsequent appropriation for irrigation in such sense that the second proprietor will be entitled to the water when not needed or used for the operation of the mill. The second appropriator may as well have made his diversion at a point above the mill as below it. It is not required that the mill owner's appropriation when not in use by him should run idly through the mill-race into the stream before it can be appropriated by another." *Windsor Co. v. Hoffman Co.*, 48 Colo. 89, 109 Pac. 425.

"Whenever the waters constituting this particular appropriation were not in use, or were not needed for use by the milling company, and were by it left in the stream, they were as subject to appropriation and use during such times, at any point upon the river, either above or below the tail of the old mill-race, as were any of the other unused or unappropriated waters of the stream, and the one first in time to actually take and apply this water to a beneficial purpose, when not being used by the milling company, is the first in right, whether such a one has his point of diversion above the tail of the old mill-race or below it." *Windsor Co. v. Hoffman Co.*, 48 Colo. 82-87, 109 Pac. 422.

"After this volume of water fulfilled its mission of running the mill machinery, it was turned back into the natural channel. * * * * After the water had again reached the natural channel, the plaintiff (whose head-gate was below the outlet of the mill-race) had the right to appropriate it directly from the stream. * * * * That the water company (a prior appropriator above the millrace) wanted to use it, or was prepared to use it if he could get it, but did not until after the plaintiff appropriated it, is no reason why the latter's rights should be subordinated to those of the former." *Cache La Poudre R. Co. v. Water S. & S. Co.*, 25 Colo. 161-168, 53 Pac. 331.

Sec. 57. Reservoirs.

See Reservoirs, Sec. 260.

Sec. 58. Speculative purposes—Allowed but limited.

Corporations and individuals may, it seems, divert water for speculative purposes, i. e., to sell to those who will actually consume the water, but the water thus diverted or appropriated must not be held and not used for a long period of time. *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-363, 40 Pac. 989.

Nine years is held to be an unreasonable length of time.

Id. 365-366. *Combs v. Ag. D. Co.*, 17 Colo. 146-151, 28 Pac. 966.

Sec. 59. From canon, not a running stream.

Syl. "A valid appropriation of water may be made from a canyon, notwithstanding it is not a running stream and the water comes entirely from the rainfall from the surrounding hills." *Denver, etc., R. R. Co. v. Dotson*, 20 Colo. 304, 38 Pac. 322.

Sec. 60. In Colorado for use in New Mexico.

See Pleading and Practice, Sec. 229b.

Sec. 61. On public land.

"It is * * * true that one who, in good faith, goes upon the public land and seeks to obtain title under the public land laws has, as against a subsequent claimant, certain rights which are entitled to protection." *Nipple v. Forker, et al.*, 26 Colo. 74-78, 56 Pac. 577.

Sec. 62. Acts of congress recognizing appropriations.

a. Vested rights.

"That whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Sec. 2339 Rev. Stat. U. S.

The above section was construed in *Citizens S. & L. Assn. v. Topeka*, 87 U. S. 670, and it was held that there need not be a combination of "local customs, laws and the decisions of courts," but that the showing of the existence of either one would suffice. See also *Jennison v. Kirk*, 98 U. S. 453.

b. Act construed.

"In that case (*Broder v. Water Co.*, 101 U. S. 274) the court declared, in effect, that the Act of July 26, 1866, was a voluntary recognition by congress of the pre-existing rights of those who by priority of possession had constructed canals and ditches to be used in mining operations and for the purpose of agricultural irrigation, where such artificial use of water was an absolute necessity * * * ." *Platte W. Co. v. Northern C. I. Co.*, 12 Colo. 525-533, 21 Pac. 711.

c. Recognition of existing rights.

"Section 2339, Revised Statutes of the United States, is a recognition by congress of water rights that have become vested and accrued and acknowledged by the local customs and laws." *Nipple v. Forker, et al.*, 26 Colo. 74-78, 56 Pac. 577; *Boglino v. Giorgetta*, 20 Colo. App. 338-344, 78 Pac. 612; *Bascy v. Gallagher*, 20 Wall., 670; *Broder v. Water Co.*, 101 U. S. 276; *Platte W. Co. v. North. Colo. I. Co.*, 12 Colo. 525-530, 21 Pac. 711.

Sec. 63. Act of territorial legislature.

"Nor shall the water of any stream be diverted from its original channel to the detriment of any miner, millmen or others along the line of said stream, *who may have a priority of right*, and there shall be at all times left sufficient water in said stream for the use of miners and agriculturists along said stream. Session Laws 1864, p. 68, Sec. 32." *Coffin v. Left Hand D. Co.*, 6 Colo. 447.

The above statute was repealed in 1868, but afterwards re-enacted verbatim.

Sec. 64. Constitution regarding appropriation.

"The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose." *Colorado Constitution*, Art. 16, Sec. 6.

a. Construed.

Syl. "The provisions of the constitution operate prospectively only, unless a contrary intention clearly appears from the words employed." *Strickler v. City of Colo Springs*, 16 Colo. 61-62, 26 Pac. 313.

"There is nothing in that instrument (constitution) which indicates that its provisions shall operate otherwise than prospectively. * * * * " *Colo. M. & E. Co. v. Larimer & Weld I. Co.*, 26 Colo. 47-52, 56 Pac. 185.

"By the constitution and laws of Colorado, state and territorial, from the earliest times, rights to the beneficial use of water from natural streams have been acquired by diversion through prior appropriation rather than by grant." *Platte Water Co. v. Northern C. I. Co.*, 12 Colo. 525-531, 21 Pac. 711.

Sec. 65. Amount appropriated—Limited.

"Both the law under which this decree was rendered and the decree itself contemplate that no claimant shall be entitled to the use of a quantity of water in excess of that actually needed for the purpose for which the appropriation was made." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-362, 40 Pac. 989.

"The appropriation of water for a specific purpose qualifies such appropriation by limiting the volume to the quantity necessary for that purpose. * * * 13 Cal. 33; Kinney on Irrigation, Sec. 231; * * * * 21 Cal. 374." *The Colo. M. & E. Co. v. Larimer & Weld Co.*, 26 Colo. 47-49, 56 Pac. 573.

Sec. 66. Beneficial use of water appropriated.

a. Most important factor.

Beneficial use is the most important factor in the making of an appropriation.

All other requirements, such as filing, diversion, construction, etc., are insignificant in comparison with beneficial use. *Conley, et al. v. Dyer, et al.*, 43 Colo. 22-28, 95 Pac.

304; *Wheeler v. Northern Colo. I. Co.*, 10 Colo. 582, 17 Pac. 487; *Yunker v. Nichols*, 1 Colo. 551; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. 966; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175; *Burkart, et al., v. Meiberg*, 37 Colo. 187, 86 Pac. 98; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. 391; *X. Y. I. D. Co. v. Buffalo Creek I. Co.*, 25 Colo. 529, 55 Pac. 720; *Drach v. Isola*, 48 Colo. 134-143, 109 Pac. 748; *Crawford C. D. Co. v. Needle R. D. Co.*, 49 Colo. 362, 114 Pac. 655.

See Mill-race, Sec. 56a.

b. Decree—Referee's findings.

"The referee must ascertain from the evidence the existence of such fact (beneficial use) before he can award any priority to a ditch. But we find no provision of the statute requiring that the decree shall state upon its face that the water appropriated was applied to a beneficial use." *Broadmoor D. Co. v. Brookside W. Co.*, 24 Colo. 541-546, 52 Pac. 792.

c. Excessive diversion is not to beneficial use.

"In the trial of such an issue (mandamus) it is also important to observe that no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water can not be regarded as a diversion to *beneficial use* within the meaning of the constitution." *Combs v. Ag. D. Co.*, 17 Colo. 146-153, 28 Pac. 966.

Sec. 67. Change of purpose of use.

An appropriation for immediate irrigation cannot be changed to an appropriation for storage. *Finley v. Cache la Poudre Co.*, 44 Colo. 234, 98 Pac. 173; *Cache la Poudre I. D. Co. v. Hawley, et al.*, 43 Colo. 32-42, 95 Pac. 317; *Seven Lakes R. Co. v. New Loveland & G. I. & L. Co.*, 40 Colo. 382-386, 93 Pac. 485.

Sec. 68. Change of character and method of use.

See Sec. 255, 145.

"A priority to the use of water is a property right which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others." *Seven Lakes R. Co. v. New Loveland & G. I. & L. Co.*, 40 Colo. 382-385, 93 Pac. 485; *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 839; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313; *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144, 53 Pac. 318.

Sec. 69. Double duty.

Water can not be claimed both for storage and immediate irrigation, under an appropriation for irrigation. *Cache la Poudre I. D. Co. v. Hawley, et al.*, 43 Colo. 32-42, 95 Pac. 317.

"In other words, that he attempted to make the same appropriation of water do double duty during the same irrigating season, which this court in *Ft. Lyon C. Co. v. Chew, et al.*, 33 Colo. 392, 81 Pac. 37, said could not be done." *Diez v. Hartbauer*, 46 Colo. 599-600, 105 Pac. 868.

Sec. 70. Enlarged use.**a. Defined.**

See *Change of Point of Diversion*, Sec. 116a.

"An (enlarged) use may mean that more land is being irrigated with the same quantity of water than formerly was employed in irrigating fewer acres. It does not necessarily imply that a greater volume is required." *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144-152, 53 Pac. 318; *Fulton I. D. Co., et al., v. Meadow I. I. Co.*, 35 Colo. 588-591, 86 Pac. 748.

b. In general.

"The owner of a senior right can not enlarge his use of water to the injury of a junior right holder." *Eaton, Ex.*,

v. Larimer & Weld I. Co., et al., 35 Colo. 16-17, 83 Pac. 627.

The above decision is regarding consumers from a canal.

c. Proof.

"It was certainly incumbent * * * * to establish the alleged enlarged use of these priorities, to prove in some appropriate way that a greater quantity of water, measured either by volume or time, than these priorities were entitled to, was being diverted." *Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102-107, 75 Pac. 391.

Sec. 71. "First in time first in right."

See Vested Rights.

"That the first appropriator of the water of a natural stream has a prior right to such water, to the extent of his appropriation, is a doctrine that we must hold applicable, in all cases, respecting the diversion of water for the purpose of irrigation." *Schilling v. Rominger*, 4 Colo. 100-103. The above case was decided before the passage of the statutes of 1879 and 1881.

"The first appropriator of the water of a natural stream has a prior right to such water to the extent of his appropriation—*Schiling, et al., v. Rominger*, 4 Colo. 100—and an appropriation of water for irrigation is effected, within the meaning of the constitution, when actually applied to land for that purpose. *Farmers' H. L. C. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028; *Ft. Morgan L. & C. Co. v. South Platte D. Co.*, 18 Colo. 1, 30 Pac. 1032." *Wellington, et al., v. Beck*, 30 Colo. 409-411, 70 Pac. 687.

Sec. 72. Fish lake.

There is no statute in regard to appropriation of water for a "fish lake." *Windsor R. & C. Co. v. Lake S. D. Co.*, 44 Colo., 214-232, 98 Pac. 729.

Sec. 73. Flood and surplus water may be appropriated.

When all of the water of a stream in its natural flow has been appropriated, that which is known as flood waters

and that which prior appropriators do not require may be appropriated. *Humphreys Co. v. Frank*, 46 Colo. 524; 105 Pac. 1093.

Sec. 74. Headgate—Tapping canal.

Syl. "The fact that the headgate of a feeder of a reservoir taps another canal and not the stream itself, is not conclusive evidence, if in fact it is any evidence of an intention not to make an appropriation of the water of the natural stream. If a company can make arrangement with the owner of canal whereby it may put in the canal a headgate, and use the canal itself as a conduit for carrying the water directly from the stream to such headgate and thence by its own feeder carry the water of the stream to its reservoir for storage purposes that is a matter of contract between the two. Such a right might be acquired by condemnation in a proper case (Colo. Stat. Anno., Sec. 3172) and, of course, by contract." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 24 Colo. 322-323, 5 Pac. 496.

Sec. 75. Intent to appropriate.

See Reservoirs, Sec. 253.

"While a diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed." *Larimer Co. R. Co. v. People*, 8 Colo. 614-617, 9 Pac. 794.

Sec. 76. Map and statement act.

See Adjudication, Sec. 30.

Sec. 2265 Mills Anno. Stat. is unconstitutional. *Blake, et al., v. Boye, et al.*, 38 Colo. 55-59, 88 Pac. 570.

If, upon the faith of the map and statement statute, one had incurred expense in making his appropriation, would the obligation of the contract between him and the state be violated? *See Blake, et al., v. Boye, et al.*, 38 Colo. 55-59, 88

Pac. 570, and *Lamar C. Co. v. Amity L. & I. Co., et al.*, 26 Colo. 370-379, 58 Pac. 600.

a. Statements.

The date fixed in such statement is not conclusive and binding on the parties, but an earlier date may be found and decreed. *Windsor R. & C. Co. v. Lake S. D. Co.*, 44 Colo. 214-232, 98 Pac. 729.

Sec. 77. Place of use.

See Change of Point of Diversion, Sec. 110.

"The right to use is not confined to riparian owners and "does not depend upon the locus of its use." *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-428, 94 Pac. 339; *Coffin, et al., v. Left Hand D. Co.*, 6 Colo. 443-444.

"Where a party conveyed a priority of right to the use of water, he retaining the rights of a junior appropriator, and the land, originally irrigated by his grantee with the water conveyed, became saturated and boggy, so that the water could no longer be used thereon with profit, the grantee, or his successor in title, could transfer the use of the water to other lands, or could transfer it to other persons to be used in irrigating their lands, in exchange for water from another ditch, if by the transfer or exchange no more water was used than was originally used and no other right of a junior appropriator was injuriously affected." *King v. Ackroid*, 28 Colo. 488, 66 Pac. 906; *Reservoir Co. v. Irrigating Co.*, 8 Colo. App. 237, 45 Pac. 525.

Sec. 78. Priority.

See Pleading and Practice, Sec. 234e.

See Reservoirs, Sec. 258.

a. How acquired.

"The right to divert water therefrom (streams) and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the

use of the water may be acquired." *Land & C. Co. v. Ditch Co.*, 18 Colo. 1, 3, 30 Pac. 1032; *Wheeler v. Northern C. I. Co.*, 10 Colo. 582, 17 Pac. 487.

b. Measure of.

"As a priority may be measured both by volume and time, the number of acres of land lying under the ditch which it was proposed to irrigate is material, at least as to the element of time." *Bates v. Hall*, 44 Colo. 360-368, 98 Pac. 3.

c. To ditches.

"Priorities (are) to the several ditches and not to those claiming water under the ditches." *Ind. D. Co. v. Agr. D. Co.*, 22 Colo. 513-524, 45 Pac. 444.

d. Different—From same ditch.

"Appropriators of water from the same streams, through the same ditch, may have different priorities * * * ." *Ind. D. Co. v. Agr. D. Co.*, 22 Colo. 513-521, 45 Pac. 444; *Nichols v. McIntosh*, 19 Colo. 22-24, 34 Pac. 278; *Thomas v. Guirand, et al.*, 6 Colo. 530; *Rominger v. Squires*, 9 Colo. 327-328, 12 Pac. 213; *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 836; *Farmers H. L. C. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028.

e. Modes of diversion—Unimportant.

"In acquiring a priority of right to the use of water for purposes of irrigation the mode of diversion is unimportant." *Nichols v. McIntosh*, 19 Colo. 22-24, 34 Pac. 278; *Thomas v. Guirand, et al.*, 6 Colo. 530-533.

f. Ownership, distinguished from ownership of stock in a corporation.

See Sec. 99.

Sec. 79. Returned waters—Sufficient to satisfy appropriation.

"The senior appropriator may lawfully demand that he have at his headgate sufficient water to supply his present

needs, and if that result be obtained, through return waters after first use by junior appropriators up the stream, the senior appropriator has no just ground of complaint." *Vogel v. Minn. Co.*, 47 Colo. 534-540, 107 Pac. 1108.

Sec. 80. Riparian rights—Distinguished from constitutional and statutory rights.

"At common law the water of a natural stream is an incident of the soil through which it flows; under the constitution the unappropriated water of every natural stream is the property of the public. At common law the riparian owner is, for certain purposes, entitled to the exclusive use of the water as it flows through his land; under the constitution the use of the water is dedicated to the people of the state subject to appropriation. The riparian owner's right to the use of water does not depend upon user, and is not forfeited by non-user; the appropriator has no superior right or privilege in respect to the use of water on the ground that he is a riparian owner; his right of use depends solely upon appropriation and user; and he may forfeit such right by abandonment or by non-user for such length of time as that abandonment may be implied. A riparian proprietor owning both sides of a running stream may divert the water therefrom, provided he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution, in quantity, quality, or force; the appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the same withersoever necessity may require for beneficial use, without returning it, or any of it, to the natural stream in any manner. The appropriator may, under certain circumstances, change the point of diversion as well as the place of application of the water; he has a property right in the water lawfully diverted to beneficial use, and may dispose of the same separate and apart from the land in connection with which the right ripened to anyone who will continue such use without injury to the rights of

others." *Oppendlander v. Left Hand D. Co.*, 8 Colo. 142-148, 31 Pac. 854; *Sieber, et al., v. Frink et al.*, 7 Colo. 148, 2 Pac. 901; *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 836; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 78 Pac. 966; *Farmers H. L. C. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028; *Platte Water Co. v. Northern C. I. Co.*, 12 Colo. 525-531, 21 Pac. 74.

Sec. 81. Right to water appropriated is a freehold estate.

"The plaintiffs allege a right to have a certain quantity of water flow through the irrigation company's ditch. This right is an easement in the ditch. It is a right annexed to realty, and, being a perpetual right, is an incorporeal hereditament descendible by inheritance to plaintiff's heirs, and hence, a freehold estate." *Wyatt v. Irrigation Co.*, 18 Colo. 298-307, 33 Pac. 144.

"The right acquired to water by an appropriator is of the same character * * * as an incorporeal hereditament and easement." *Id.* 316.

Sec. 82. Same quantity may be appropriated for use at different times.

"One may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time, and another person an appropriation of a like quantity from the same source during another period, and as to the same be a prior appropriator himself. In other words, there is no difference in principle between 'an appropriation measured by quantity and an appropriation measured by time'." *Cache la Poudre R. Co. v. Water S. & S. Co.*, 25 Colo. 161-167, 53 Pac. 331.

"For if the water company did not make such an appropriation to be enjoyed during the winter season * * * until after the plaintiff made its appropriation, and limited to that season, the latter, as to the volume of water actually appropriated

by it, becomes a senior appropriator as to the winter flow." Id. 166.

Sec. 83. Senior appropriators cannot enlarge rights to injury of junior appropriators.

"An appropriator of water from a stream already partly appropriated acquires a right to the surplus or residuum he appropriates, and those in whom prior rights in the same stream are vested, can not extend or enlarge their use of water to his prejudice, but are limited to their rights as they existed when he acquired his (* * * 6 Nev. 83; 25 Colo. 161; Kinney on Irrigation, Secs. 230-232; * * * 34 Cal. 109) because in such case, each with respect to his particular appropriation is prior in time and exclusive right. * * *

There was presented in this case an entirely new question, namely, the right of the irrigation company to divert water for storage as against the plaintiff for power purposes, which depended for determination upon what the evidence established with reference to the time of the appropriation of each for these respective purposes, which was not settled by the statutory adjudication." *Mill & E. Co. v. Irrigation Co.*, 26 Colo. 47-49, 56 Pac. 185.

In the above cited case the defendant sought to use water for storage during the non-irrigating season, based only upon its appropriation for irrigation.

Sec 84. Tenants in common.

"One tenant in common may preserve the entire estate held in common. This doctrine is applicable where the common estate is a water right, so long as the tenant in common has both the necessity for the use, and actually uses the water for a beneficial purpose." *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 141-151, 53 Pac. 318.

Sec. 85. Title of land on which water is used is not necessarily in the appropriator.

"And the water diverted was immediately applied to the cultivation of lands then in his possession or under his con-

trol, though several years elapsed thereafter before he obtained the title thereto." *Thomas v. Guiraud*, 6 Colo. 533.

Sec. 86. What does not constitute an appropriation.

a. A mere diversion.

"A mere diversion of water from a stream does not constitute an appropriation." *Independent D. Co. v. Agricultural D. Co.*, 22 Colo. 513-521, 45 Pac. 444. There must be an application to a beneficial use. *Conley, et al. v. Dyer, et al.*, 43 Colo. 22-28, 95 Pac. 304. *Tanghenbough v. Clark*, 6 Colo. App. 235, 40 Pac. 153. *Colo. L. & W. Co. v. Rocky Ford, etc. Co.*, 3 Colo. App. 545, 34 Pac. 580.

b. A grant.

"The acquisition of the right to the use thereof results from appropriation, and not from a grant by the state." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-366, 40 Pac. 989.

c. An enlargement of ditch.

Syl. "Held that the work voluntarily performed by defendant in enlarging the ditch, while in possession under the contract, should not be regarded an appropriation." *McElravy v. Brooks*, 48 Colo. 207, 109 Pac. 863.

d. Use by permission.

"Use of water by permission or by agreement with a municipality owning a ditch will not constitute an appropriation." *Park v. Park, Executor*, 45 Colo. 387, 101 Pac. 348.

e. Use during high water.

"The use of water from the creek, without regard to the decree, during high water only, can not be said to establish a use under the decree." *Drach v. Isola*, 48 Colo. 134-146, 109 Pac. 748.

The length of time water can be used is analogous to an enlarged use. *Bates v. Hall*, 44 Colo. 360-369, 98 Pac. 3.

Sec. 87. Waste waters—Appropriation of.**a. Excess water flowing on surface of land.**

One can not appropriate an excess of water flowing on the surface from another party's land onto his own. The party allowing the water to so waste has no right so to do, and certainly he could not be enjoined from ceasing to do that which he had no right to do. *Burkart, et al. v. Meiberg*, 37 Colo. 187, 86 Pac. 98.

In the above cited case "A" had dug a ditch, along the boundary line between her land and "B's," on her land and had for a number of years used the waste surface flow from "B's" land for irrigation. "B" dug a ditch on her land and collected the waste water and transferred it to other land, thus depriving "A" of the water. Held, that "B" was in the right. *Id.* 187.

b. From ditch.

Syl. "Where an irrigation ditch at times ran a surplus of water, which surplus it discharged at its terminus into a natural drain, one who appropriated such surplus or waste water after it was discharged from the ditch acquired a right only to whatever water flowed from the ditch after the ditch company had supplied its own wants and necessities, and did not acquire a vested right to any specific quantity of water, and acquired no right to interfere with the water flowing in the ditch or any of its laterals, and the ditch company was under no obligation to permit any specific quantity of water to be discharged at the terminus of its ditch." *Mabee v. The Platte L. Co.*, 17 Colo. A., 476, 68 Pac. 1058.

c. From tunnel.

See Sec's. 46, 51.

"The water from the tunnel finds its way to the stream and has become a part thereof. It inures to the benefit of all taking water therefrom. In this particular water the claimants have no interest or right which will permit them to segregate a volume of water equal to that flowing from the tun-

nel, even if it be an actual increase, and assert an exclusive right thereto as against others diverting water from the stream. *La Jara C. & L. S. Assn. v. Hansen*, 35 Colo. 105, 83 Pac. 644." *Farmers U. D. Co. v. Rio Grande C. Co.*, 37 Colo. 512-521, 86 Pac. 1042.

d. Return to stream.

"Waste water from irrigating ditches which is again returned to the stream or its tributaries, becomes a part of the water of the stream the same as though never diverted, and inures to the benefit of appropriators in the order of their appropriations." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 25 Colo. 87, 53 Pac. 386.

CHAPTER V.
CANAL COMPANIES.

Defined § 88.

- (a) Quasi public carrier.
- (b) Trustee for consumer.
- (c) Nature of canal company.

Application for water to company—Time to make § 89.

By-Laws of canal company regarding change of place of use § 90.

By-Laws of Mutual Ditch company § 91.

- (a) Forfeiture under by-laws.

Compensation of canal companies § 92.

- (a) Sale of stock for non-payment of assessment—Notice.

Contract—Canal company with consumer § 93.

- (a) Action on.
- (b) Cancellation of contract as to excess rights sold.
- (c) For use on specified lands.
- (d) For right of way.
- (e) Form of contract.
- (f) Interference by county commissioners.
- (g) Part of water right must be delivered.
- (h) Payment for water in advance.
- (i) Priority of use.
- (j) Re-organization.
- (k) To convey the canal to consumers.
- (l) Option—Terminates at will of consumer.
- (m) To deliver water in separate shares.
- (n) Parole.
- (o) Proof of contract—Voluminous.
- (p) Form of contract.
- (q) That consumer may forcibly take water—Void.
- (r) To enlarge a ditch—Perpetual water right.
- (s) To use water cannot be construed as an appropriation.
- (t) To purchase.
- (u) Unrecorded—Innocent purchaser.

Duties of company § 94.

- (a) To sell water.
- (b) To furnish water.
- (c) To keep ditch in repair.

Oral contract to furnish water perpetually is not within the Statute of Frauds § 95.

Rates of charge for water—County commissioners fix § 96.

- (a) Reasonable.
- (b) Demand for change of rates.
- (c) Special contract.
- (d) Maximum amount.
- (e) Petition—Parties.

Right to purchase water from canal company § 97.

Rules of company—Conditions precedent § 98.

Stock—Ownership—Distinguished from ownership of a priority § 99.

Sale of excess rights § 100.

Transfer of interests to a new corporation under contract § 101.

Unincorporated canal companies § 102.

- (a) May be formed by the owners of a ditch.
 - (b) The contract entered into in forming a joint stock company may be enforced.
 - (c) The contract or articles of association are analagous to the charter of a corporation or articles of partnership.
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Sec. 88. Defined.

a. Quasi public carrier.

"Ditch corporations are *quasi* public carriers." *Independent D. Co. v. A. G. R. D. Co.*, 22 Colo. 513-521, 45 Pac. 444.

b. Trustee for consumer.

"A corporation owning and operating a ditch becomes a trustee for its stockholders and is bound to protect their interests." *Id.* 522.

Canal companies are trustees for the stockholders and consumers. *O'Neill, et al. v. Ft. Lyon C. Co., et al.*, 39 Colo. 487-494, 90 Pac. 849; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691; *Independent D. Co. v. Agr. D. Co.*, 22 Colo. 513, 45 Pac. 444; *Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. 648.

c. Nature of canal company.

"Under the constitution, as I understand it, the carrier is at least a *quasi* public servant or agent. It is not the attitude

of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others; being engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control." *Wheeler v. Northern Colo. I. Co.*, 10 Colo. 582-589, 17 Pac. 487; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo. 298-308, 33 Pac. 144; *White v. High Line C. Co.*, 22 Colo. 191-197, 43 Pac. 128.

"Its *status* is more like that of a private carrier, whose duties are measured by the obligations it assumes towards its consumers, and such as the law imposes by reason of the nature of the business in which it is engaged. While it may not impose conditions that operate to deprive consumers of the enjoyment of their constitutional rights, it may require them to exercise such rights under reasonable regulations and limitations. The consumer, by reason of his application of the water to a beneficial use, is said to be an appropriator, yet we do not think he occupies the exact status of one who appropriates the water directly from the public stream. His contract with the company is not the purchase of a given volume of water, but the purchase of the right to use the canal as a means to conduct a given volume, or so much thereof as may be necessary to irrigate a given number of acres; while one who diverts the water through his own channel directly from the stream, having made an appropriation of a given volume without any such limitation imposed, is at liberty to divert that volume when such diversion does not interfere with the prior rights of others and apply it for the use for which it was originally intended, or on an acreage exceeding that for which the diversion was originally made. In other

words, the consumer under a ditch, by the express terms and limitations of his contract, does not acquire a right to the continuous use of the maximum of the water right conveyed, and which may have been necessary to irrigate the specified number of acres originally; but only acquires the right to have so much thereof furnished for such length of time as the land, in its existing condition, requires." *Wright v. Platte Valley C. Co.*, 17 Colo. 322-329, 61 Pac. 603; *Wheeler v. Northern C. Co.*, 10 Colo. 382-383, 17 Pac. 487; *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Rocky Ford Canal, Co. v. Simpson*, 5 Colo. App. 30; 36 Pac. 638.

Sec. 89 Application for water to company—Time to make.

Ver. "Though the prior purchaser has not made application within the time prescribed by the rules, yet if he does so afterwards, and while the ditch owner is free from conflicting obligations, and is able to grant his request, the statutory right to purchase is not forfeited." *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

Sec. 90 By laws of canal company regarding change of place of use.

Ver. *See* *Sec. 103.*

Ver. Change of place of diversion. *Sec. 110.*

"That the plaintiff in error would have the right to use the water in question on the lower ranch, notwithstanding its long use only upon the upper ranch, unless such right is restricted by some valid law or agreement, we entertain no doubt, and that so valuable a right can not be impaired or restricted by a by law having that effect, unless the same was duly authorized by the charter of the company, or assented to by the stockholder whose right is affected thereby." *Knowlton v. Colorado C. N. R. & C. Co.*, 18 Colo. 209, 210; 32 Pac. 270. *Ver.* *See* *Ver. v. Denver C. Co. v. Water S. & S. Co.*, 20 Colo. 440, 43, 68 Pac. 781.

Sec. 91. By-laws of mutual ditch company.

"A ditch company diverting water from a natural stream for general purposes of irrigation can not by any provision or declaration of its by-laws, rules or regulations, exempt itself or its stockholders from the operation of the state constitution." *Combs v. Agricultural D. Co.*, 17 Colo. 146-150, 28 Pac. 966.

a. Forfeiture under by-laws.

The by-laws of a mutual ditch company may provide that when one of the stockholders is not using his share of the water the other stockholders may use it, but such provision will not work a forfeiture of his rights if he should have no land upon which to use the water; neither would it prevent him from changing the point of diversion. *Wadsworth D Co., et al. v. Brown*, 39 Colo. 57-63, 67 Pac. 152.

Sec. 92. Compensation of canal companies.

See Distribution, Sec. 144.

Syl. "The carrier is entitled to compensation for carriage, but it cannot charge for the *right to use water* from its canal. Nor can it exact in advance a part or all of its transportation charge, for the remaining years of its corporate life, as a condition precedent to use for the current irrigation season." *Wheeler v. N. C. I. Co.*, 10 Colo. 583, 17 Pac. 487.

a. Sale of stock for non-payment of assessment—Notice.

See Pleading and Practice, Sec. 223e.

Where the by-laws require notice of a levy of assessment on stock to be published in a newspaper and there is a sale of such stock for non-payment of the assessment without the publication of the notice, actual notice given to the stockholder is sufficient and a sale thereunder is lawful. *Grand Valley I. Co. v. Fruita I. Co.*, 37 Colo. 483-506, 86 Pac. 324.

Sec. 93. Contract—Canal company with consumer.

See Easement, Sec. 163.

a. Action on.

If one should sue on a contract, he could not recover on a *quantum meruit*. *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. 695; *Tangembaugh v. Clark*, 6 Colo. App., 235-306, 40 Pac. 153; *Church v. Stillwell*, 12 Colo. App., 43-75, 54 Pac. 395; *La Junta & Lamar C. Co. v. Hess*, 6 Colo. App., 497-521, 42 Pac. 50.

See Forfeiture, Sec. 195-7.

Syl. "A provision in such contract that, upon failure to pay the annual rental, the consumer 'forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch,' applies only to the rights given by the contract, and does not waive the consumer's statutory right to obtain water from the company's ditch under an order of the county commissioners." *S. B. & R. C. D. Co. v. Marfell*, 15 Colo. 303, 25 Pac. 504.

b. Cancellation of contract as to excess rights sold.

See Pleading and Practice, Sec. 234f.

See Adjudication, Sec. 23g.

The contract "provided that when the estimated capacity of the canal was disposed of * * * that then the title to the canal should pass to the owners or holders of such contracts." The estimated capacity was sold and the title to the property passed to a company composed of the consumers. Rights in excess of the estimated capacity had been sold by the original and contracting company. In an action by the new company to cancel such excess rights an offer to return the money paid therefore was not necessary, as the new company was not the successor of the original company, but the grantee. *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-230, 73 Pac. 249.

c. For use on specified lands.

It is held that a contract that water shall be used on

specified land and on no other is equitable and can be enforced. *Wright v. Platte Valley I. Co.*, 27 Colo. 322-323, 61 Pac. 603.

d. For right of way.

In a contract for a right of way, a perpetual right to a certain amount of water, free from expense, was given. It was held that the party receiving the water was not entitled to share in water afterwards acquired by the contracting company. It was intended to give by the contract only what the company would acquire by its appropriation, and not by purchase. *True v. Rocky Ford C. R. & L. Co.*, 36 Colo. 43-44, 85 Pac. 842.

e. Form of contract.

See People v. Farmers H. L. C. Co., 25 Colo. 202-203, 54 Pac. 626; *Flick v. Hahn's Peak etc. Co.*, 16 Colo. App., 485, 66 Pac. 453.

See La Junta & Lamar C. Co. v. Hess, 6 Colo. App., 497-498, 42 Pac. 50.

f. Interference by county commissioners.

"A proviso in such order that it shall not affect existing contracts does not exclude from the privileges of the order consumers who have signed such option contracts, and then terminated them by applying for the order." *S. B. & R. C. D. Co. v. Marfell*, 15 Colo. 303, 25 Pac. 504.

g. Part of water right must be delivered.

A canal company must deliver a fractional part of a water right and construct a headgate therefor if it can be done without detriment. *Downey, et al. v. Twin Lakes L. & W. Co.*, 41 Colo. 385, 92 Pac. 946.

The "detriment" must be out of the ordinary.

h. Payment for water in advance.

A provision requiring water to be paid for in advance is waived by the acceptance of notes for past rental. *Kimball et al. v. Northern C. I. Co.* 42 Colo. 412-418, 94 Pac. 333.

i. Priority of use.

It seems that it was held that contracts between canal companies and consumers control, regardless of priority of use by consumer. *O'Neill, et al. v. Ft. Lyon C. Co., et al.*, 39 Colo. 487-488, 90 Pac. 849.

j. Re-organization.

Syl. "Where the water right owners in a ditch delegated to a committee authority to reorganize the company, and the instrument creating the committee authorized a majority to act, it is immaterial that one of the committee did not participate in its deliberations where a majority of the committee concurred in the action." *Doland v. Grand Valley I. Co.*, 28 Colo. 150-151, 63 Pac. 300.

k. To convey the canal to consumers.

A contract which provides that the canal shall be conveyed by the company which constructs it to the consumers under the canal when the number of water rights sold and in force shall be equal to the "estimated capacity of the company's canal to furnish water," is equitable and will be enforced. *Larimer & Weld I. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. 528.

l. Option—Terminates at will of consumer.

Syl. "A contract by which a ditch company agrees to furnish a consumer with a certain amount of water 'year after year, so long as (he) shall pay the annual rental therefor' is a mere option which may be terminated by the consumer at the end of any year * * *." *S. B. & R. C. D. Co. v. Marfell*, 15 Colo. 302-303, 25 Pac. 504.

m. To deliver water in separate shares.

Syl. "The enumeration of the rights of the grantees in an agreement to deliver distinct and specific quantities of water to two grantees mentioned, or their legal representatives, wherein the only right to a separation or division of the water granted, is 'to be delivered in separate shares to

each party, or the whole quantity to be delivered together, as said second parties may determine, either of said parties to have the right to demand and receive his proportionate share at any time,' is an inhibition upon the right to demand the separate delivery of more than the two quantities of water specified, and consequently a limitation upon the alienees of the parties to require separate deliveries of their respective subdivisions. The alienees, whether by contract or operation of law, must receive the water in the same manner as the original grantee * * * ." *Rockwell v. Highland D. Co.*, 1 Colo. App., 396-397, 29Pac. 285.

n. Parole.

Syl. "A parole contract whereby-----was to construct a ditch through the land of.....and both parties were to have the joint use of the ditch for irrigation purposes, was not void under the statute of frauds, but when executed, by the construction of the ditch, vested in plaintiff an irrevocable easement in the ditch." *Croke v. The American National Bank*, 18 Colo. App. 3, 70 Pac. 229; *De Graffenried v. Savage*, 9 Colo. App., 131, 47 Pac. 902; *White v. Highline C. Co.*, 22 Colo. 191, 43 Pac. 1028.

o. Proof of contract—Voluminous.

See Evidence, Sec. 194.

p. Form of contract.

See Flick v. Hahn's Peak, etc., Co., 16 Colo. App., 485, 66 Pac. 453.

q. That consumers may forcibly take water—Void.

A contract between a canal company and a consumer that the consumer could take water if the right was denied him by the company, is void as being in contravention of statute and in disregard of the rights of others. *White v. Highline C. Co.*, 22 Colo. 191, 43 Pac. 1028; *Farmers H. C. & R. Co. v. White*, 5 Colo. App. 1, 31 Pac. 345.

r. To enlarge a ditch—Perpetual right.

Syl. "E. company having a ditch and headgate on a stream entered into a written agreement with "C" company, whereby it was agreed that "C" company should enlarge the "E" company ditch * * * , and in consideration thereof "C" company was to have the privilege of carrying its water through the ditch thus enlarged from the headgate to a point where the "C" company ditch intersected the enlarged ditch, and after the enlargement that part of the ditch so enlarged was to be jointly maintained by the two companies, each contributing its *pro rata* share of the expense. The agreement specified no period of time that it was to run, nor did it otherwise define the interests and rights of the respective parties. The "C" company complied with the agreement by the enlargement of the ditch. *Held*, that the agreement vested in "C" company an easement not recoverable at the pleasure of "E" company but bound "E" company to permit "C" company to carry its water through the ditch thus enlarged as long as it continued to be used as a waterway." *Chicosa I. D. Co. v. El Moro D. Co.*, 10 Colo. App., 276, 50 Pac. 731; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo. 298, 33 Pac. 144.

See Washburn on Easements, Sec. 7 p. 678; Sec. 3, p. 322; Sec. 3, p. 99.

s. To use water cannot be construed as an appropriation.

Denver v. Walker, 45 Colo. 387, 101 Pac. 348.

t. To purchase.

See Change of Point of Diversion, Sec. 104.

u. Unrecorded—Innocent purchaser.

Syl. "Secret trusts or equities in land antagonistic to the title as disclosed by the record, do not bind a *bona fide* purchaser without notice. And where a party by a quit-claim deed conveyed all his right to the prior use of certain water for irrigation and at the same time by a separate contract (unrecorded) the use of the water was limited to a certain

tract of land and when not so used was to revert to the grantor, a purchaser from the grantee without notice of the separate contract was not bound by the limitation and the grantor being a junior appropriator of the water, the fact that he constructed ditches and made preparation for the use of the water was no notice to the purchaser of the (secret) limitation." *King v. Ackroid*, 28 Colo. 488, 66 Pac. 906.

See Conveyance, Sec. 131.

Sec. 94. Duties of compnay.

See Sec. 88c.

a. To sell water.

A statutory right in a consumer to purchase implies a duty on the part of the company to sell. *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

b. To furnish water.

Syl. "A prior purchaser is entitled to continue to purchase, although he may be able to obtain water from some other source." *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

c. To keep ditch in repair.

See Damages, Sec. 140.

Sec. 95. Oral contract to furnish water perpetually is not within the statute of frauds.

A contract to furnish water perpetually is not within the statute of frauds. *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Hunt v. Hayt*, 10 Colo. 278; *Garbanati v. Fassbinder*, 15 Colo. 535, 25 Pac. 991; *McClure v. Kean*, 25 Colo. 284-287, 53 Pac. 1058; *Hamile v. Hall*, 4 Colo. App., 290, 35 Pac. 927; *Croke v. Am. Natl. Bank*, 18 Colo. App., 3-6, 70 Pac. 229.

See Conveyance, Sec. 132.

Sec 96. Rates of charge for water—County commissioners fix.

See State Officers, Sec. 278.

a. Reasonable.

The rates fixed by the county commissioners must afford a fair compensation to the company. The rates must not be so small that the result would be the "taking of property without due process of law" or the confiscation of property. *Board of County Com. of Montezuma Co. v. Montezuma W. & L. Co.*, 39 Colo. 166-172, 89 Pac. 794; *Leadville W. Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362; 164 U. S. 578; 169 U. S. 466; 116 U. S. 331; *Board of County Com'rs of Grand Co. v. People ex rel.*, 8 Colo. App., 43, 46 Pac. 107.

b. Demand for change of rates.

There does not necessarily have to be a formal demand and refusal on the part of the county commissioners to change the rate fixed for the charge for water, if it can be shown that it would have been futile to have made such application. *Board of County Com. of Montezuma Co. v. Montezuma W. & L. Co.*, 39 Colo. 166-172, 89 Pac. 794.

c. Special contract.

Syl. "Though the commissioners * * * may fix a water rate, special contracts may be made with the carrier, or consumers may continue under pre-existing contracts." *S. B. & R. C. D. Co. v. Marfell*, 15 Colo. 303, 25 Pac. 504.

Anyone, whether a consumer or not, may petition the commissioners to fix a rate and take advantage thereof. *Id.* 303.

d. Maximum amount.

Syl. "Under the constitution the county commissioners can only be authorized to establish the maximum *amount* of the rate. They can not be empowered to dictate the exact rate that shall be collected or to fix the *time or conditions* of payment." *Wheeler v. N. C. I. Co.*, 10 Colo. 583, 17 Pac. 487.

e. Petition—Parties.

Syl. “* * * It is not necessary that all consumers using or seeking water from a particular ditch should join in the application.” *S. B. & R. C. Co. v. Marfell*, 15 Colo. 303, 25 Pac. 504.

Sec. 97. Right to purchase water from canal company.

Syl. “A prior purchaser is entitled to continue to purchase, although he may be able to obtain water from some other source.” *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

Sec. 98. Rules of company—Conditions precedent.

Syl. “Under the statutes a ditch owner may make reasonable rules to be observed both by himself and the consumer in the sale and distribution of water from his ditch. But a prior purchaser who has complied with the provisions of the law can not be required, as a condition precedent to the exercise of his right to purchase water, to acknowledge the equity of all the rules adopted by the ditch company.” *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

See Distribution, Sec. 144.

Sec. 99. Stock—Ownership—distinguished from ownership of a priority.

“The ownership of a prior right to the use of water is essentially different from the ownership of stock in an irrigating company. * * * stock without * * * use gives * * * no title to the priority.” *Combs v. Ag. D. Co.*, 17 Colo. 146-151, 28 Pac. 966.

See Conveyance, Sec. 120.

Sec. 100. Sale of excess rights.

See Pleading and Practice, Sec. 2348.

A new company representing the consumers and purchasers of water and canal from the constructing company can

not be held to be bound by sales of excess rights by the old company. "When the estimated capacity of the canal had been disposed of, there was nothing more vested in either of the vendor companies to sell, and purchasers of excess rights took nothing * * *." *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-254, 73 Pac. 249.

Sec. 101. Transfer of interests to a new corporation under contract.

The company which originally constructed a canal turned it over to a new company by order of court. The new company failed to conduct the affairs of the canal in the interests of the real owners. The court, having acquired jurisdiction, still properly retained it and properly ordered the turning over of the property of the new company to another new company composed of the real owners of the property, and properly ordered the payment of the indebtedness created by receivers, and properly authorized a contract with a storage company, whereby the repair of the canal was secured. *La Junta & Lamar C. Co. v. Hess, et al.*, 31 Colo. 1, 71 Pac. 415.

Sec. 102. Unincorporated canal companies. ..

"Individuals may organize a company either by or without incorporation for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream." *Cambs v. Agr. D. D. Co.*, 17 Colo. 146-150, 28 Pac. 966.

(a) May be formed by the owners of a ditch. *Strang v. Osborn*, 42 Colo. 187-189, 94 Pac 320.

(b) The contract entered into in forming a joint stock company may be enforced. *Id.* 187.

(c) The contracts or articles of association are analogous to the charter of a corporation or articles of partnership. *Id.* 193.

CHAPTER VI.

CHANGE OF POINT OF DIVERSION.

Point of diversion—Construed § 103.

Contract to purchase if change allowed §104.

From one district to another §105.

Injurious effect §106.

- (a) Loss by seepage and evaporation.
- (b) To party complaining.
- (c) Rapidity of flow.
- (d) Waste water.
- (e) To junior appropriators.

Mutual Ditch Company § 107.

- (a) Injurious effect.
- (b) By one or more members.

Notice § 108.

On terms §109.

Of place of use § 110.

Pleading injury § 111.

Quieting title § 112.

Right to § 113.

- (a) Qualified.
- (b) Vested.

Statutes regarding § 114.

- (a) Remedial.
- (b) Proceeding must be followed.

Times of scarcity §115.

What can be shown on application § 116.

- (a) Enlarged use.
- (b) Abandonment.

What not to be determined § 117.

Vested right of junior appropriator § 118.

*For Change of Place of Storage, See Reservoirs,
Sec. 255.*

Change From Irrigation to Storage, See Sec. 67.

Change of Character of Use, See Sec. 145, 68.

See Evidence, Sec. 182.

Sec. 103. Point of diversion—Construed.

"The point of diversion of water for a beneficial use is a mere incident, and is in no sense a controlling factor in effecting an appropriation." *Windsor Co. v. Hoffman Co.*, 48 Colo. 82-86, 109 Pac. 422.

Sec. 104. Contract to purchase if change allowed.

One may enter into a contract with the owner of a right to water that he will purchase and pay for the water if a change of diversion can be secured. The contract should authorize the bringing of the suit by the proposed vendee. *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57-65, 88 Pac. 1060.

Sec. 105. From one district to another.

A change of the point of diversion may be made from one water district to another. It appears that those in the district to which the change is made may object within four years, if they did not have notice of the application for the change. *Lower Latham D. Co., et al., v. Bijou I. Co.*, 41 Colo. 212-216, 93 Pac. 483; *Independent D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. 444; *Ft. Lyon C. Co., et al. v. Ark. V. S. B. & I. L. Co., et al.*, 39 Colo. 332, 90 Pac. 1023.

Sec. 106. Injurious effect.**a. Loss by seepage and evaporation.**

Loss by seepage and evaporation is "necessarily" greatly increased by diminution in volume. *Vogel v. Minn. Co.*, 47 Colo. 534-538; *Bates v. Hall*, 44 Colo. 360-370, 98 Pac. 3.

To establish injury on account of alleged loss of water for subirrigation and seepage, proof must be alleged as to the subirrigation and title or right to the seepage must exist. *Crippen v. Glasgow*, 38 Colo. 104, 87 Pac. 1073.

"So that if it should be conceded that the seepage returned to the river has been lessened because of the use of

water upon lands other than those to which it was originally applied, and that this is a matter of which plaintiff may complain, no relief could be granted it on this account, in the absence of testimony from which such difference could be ascertained with a reasonable degree of certainty." *Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102-108, 75 Pac. 391.

b. To party complaining.

The party complaining can prove the injury to himself only and not the injury to others not parties. *Lower Latham D. Co., et al. v. Bijou I. Co.*, 41 Colo. 212-215, 93 Pac. 483; *Crippen v. Glasgow*, 38 Colo. 104, 87 Pac. 1073.

c. Rapidity of flow.

"The rapidity of the flow is also naturally decreased by the diminution in volume." *Vogel v. Minn. Co.*, 47 Colo. 534-539, 107 Pac. 1108.

d. Waste water.

The loss of waste water occasioned by the change of point of diversion may be injurious to such an extent as to defeat an action for the change of the point of diversion. *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57-61, 88 Pac. 1060.

e. To junior appropriators.

The point of diversion cannot be changed by a senior to the injury of a junior appropriator. *Baer Bros. L. & C. Co. v. Wilson, et al.*, 38 Colo. 101-103, 88 Pac. 265; *Handy D. Co. v. Loudon I. Co.*, 27 Colo. 515, 62 Pac. 847.

Sec. 107. Mutual ditch company.

a. Injurious effect.

In decreeing a change, in the point of diversion, for one of the members of a mutual ditch company, it was held that the party desiring the change should still continue to bear

his share of the maintenance of the ditch, from which the change was made, and should allow the water to flow therein, when not being used by him at the new point of diversion. *Wadsworth D. Co., et al., v. Brown*, 39 Colo. 57-65, 88 Pac. 1060. Such holding was neither affirmed nor denied by the Supreme Court.

b. By one or more members.

The change of the point of diversion by one or more consumers under a mutual ditch may be had, and the amount of water to which those seeking the change may be entitled may properly be heard and determined in a proceeding to change the point of diversion. *Hallett v. Carpenter*, 37 Colo. 30-32, 86 Pac. 317.

Sec. 108. Notice.

See Sec. 25a.

Under the statute it is necessary to give notice to those to be affected in the district in which the head-gate is located at the time of the application and not to those in other districts. *Lower Latham D. Co., et al. v. Bijou I. Co.*, 41 Colo. 212-216, 93 Pac. 483.

Sec. 109. On terms.

Under the statute of 1893, it seems that upon an application to change the point of diversion, such change must be allowed, but on equitable terms as to the amount to be changed, location of the new head-gate or other terms. *Vogel v. Minn. Co.*, 47 Colo. 534-541, 107 Pac. 1108.

If terms are impossible, the change should not be allowed. *Bates v. Hall*, 44 Colo. 360-369, 98 Pac. 3.

Sec. 110. Of place of use.

See Sec. 90.

Whether the statutes of 1899, page 235, in regard to changing the point of diversion applies to a change of the

place of use is not decided. *New Cache la Poudre I. Co. v. Water S. & S. Co.*, 29 Colo. 469-473, 68 Pac. 781; *Fuller v. Swan River P. N. Co.*, 12 Colo. 12, 19 Pac. 836.

Sec. 111. Pleading injury.

See Pleading and Practice.

Syl. "In an action by a junior appropriator of water to restrain a senior appropriator from changing the point of diversion from a point below the junior appropriator's head-gate to a point above, an allegation that the stream below plaintiff's head-gate and above the one proposed to be moved was fed by streams and seepage water sufficient to supply defendant's priority and that so long as the place of diversion was not changed the water in the stream was sufficient to supply both appropriators, but with the senior appropriator being permitted to divert his water above plaintiff's ditch, plaintiff would be deprived of his water, stated a good cause of action and the court erred in refusing to hear evidence in support thereof." *Handy D. Co. v. Loudon I. C. Co.*, 27 Colo. 515, 62 Pac. 847.

Sec. 112. Quieting title.

The point of diversion cannot be changed in an action to quiet title. *Fluke et al. v. Ford*, 35 Colo. 112, 116, 84 Pac. 469.

Sec. 113. Right to change.

a. Qualified.

"The right to change the point of diversion is qualified and not absolute." *Vogel v. Minn. Co.*, 47 Colo. 534-537, 107 Pac. 1108.

The change must not injuriously affect the rights of others. *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 836; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313; *Bates v. Hall*, 44 Colo. 360-369, 98 Pac. 3.

b. Vested.

The right to change the point of diversion, if not injurious to others, is a vested property right which attached to the appropriation and may be made at the will of the appropriator. *Diez v. Hartbauer*, 46 Colo. 599-600, 105 Pac. 868; *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57-61, 88 Pac. 1060.

Sec. 114. Statutes regarding.**a. Remedial.**

The statute relating to the change of point of diversion is remedial only, as the right existed before the enactment of the statutes. *Lower Latham D. Co., et al. v. Bijou I. Co.*, 41 Colo. 212-216, 93 Pac. 483; *New Cache la Poudre I. Co. v. Water S. & S. Co.*, 29 Colo. 469, 68 Pac. 781; *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57, 88 Pac. 1060; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313.

b. Proceeding must be followed.

A point of diversion was changed after adjudication but prior to the enactment of the statute in 1899. Held that the water commissioner could not be made to recognize the change until the subsequent statute had been followed. *New Cache la Poudre I. Co. v. Arthur I. Co., et al.*, 37 Colo. 530, 87 Pac. 799; *New Cache la Poudre I. Co. v. Water S. & S. Co.*, 29 Colo. 469-473, 68 Pac. 781.

The statute of 1899 is declared not to be *ex post facto*. *Achenfelter, et al v. Carpenter, et al.*, 37 Colo. 534, 87 Pac. 800.

Sec. 115. Times of scarcity.

Although a decree changing the point of diversion of a portion of the water decreed to a ditch be definite as to the amount to be changed, still in times of scarcity, only

so much of the water decreed to the ditch, may be diverted away from the ditch as the amount decreed to be changed bears to the whole amount decreed to the ditch, which proportion can be taken only from the amount supplied. *Hallett v. Carpenter*, 37 Colo. 30-34, 86 Pac. 317.

Sec. 116. What can be shown on application.

a. Enlarged use.

The question of an enlarged use can not be gone into in a proceeding to change the point of diversion. *New Cache la Poudre I. Co. v. Water S. & S. Co.*, 29 Colo. 469.

"But if the evidence showed that the changed conditions * * * would result in an enlarged use, the petition should not be granted." *Bates v. Hall*, 44 Colo. 360-371, 98 Pac. 3; *Fulton I. D. Co., et al. v. Meadow I. I. Co.*, 35 Colo. 588-591, 86 Pac. 748.

b. Abandonment.

The question of abandonment can not be raised in an action to change the point of diversion. *Lower Latham D. Co., et al. v. Bijou I. Co.*, 41 Colo. 212-214, 93 Pac. 483; *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57, 88 Pac. 1060.

Sec. 117. What not to be determined.

"Whether the place of diversion may be changed is not to be determined by the manner of use, or by the quantity of water employed, or the length of time the same is to be enjoyed by the plaintiff after changing from the headgate of one ditch to that of another, unless, of course, the change of conditions necessarily, or by reasonable inference, brings about an enlarged use, either in amount or time." *New Cache la Poudre I. Co. v. Water S. & S. Co.*, 29 Colo. 469-473, 68 Pac. 781.

In an application to change the point of diversion the decree in adjudication can not be attacked. *Wadsworth D. Co., et al. v. Brown*, 39 Colo. 57, 88 Pac. 1060.

Sec. 118. Vested right of junior appropriator.

It is specially the right of a junior appropriator to object to a change in the point of diversion by a senior appropriator for the reason that he has a vested right as against the senior appropriator to insist upon a continuance of the conditions as they existed at the time of his appropriation. *Handy D. Co. v. Loudon I. C. Co.*, 27 Colo. 515-518, 62 Pac. 847; *Fuller v. Swan River P. M. Co.*, 12 Colo. 12, 19 Pac. 836; *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313; *Cache la Poudre I. Co. v. Larimer & Weld I. Co.*, 25 Colo. 144, 53 Pac. 318; *Kinney on Irrigation*, Secs. 175-231-248; *Black's Pomeroy on Water Rights*, Sec. 69; 67 Cal. 267, 7 Pac. 684; 52 Pac. 765; 4 9Fed. 430; 1 Mont. 296.

CHAPTER VII.

CONVEYANCE.

Conveyance of water may be made separate from land § 119.

By delivery of certificates § 120.

By deeds of trust § 121.

- (a) Intention.
- (b) On shares of stock.
- (c) On after acquired water rights.
- (d) Statute of limitation.
- (e) Redemption.

Appurtenance § 122.

- (a) General doctrine.
- (b) Easement may be.
- (c) Need of water will not make it appurtenant.
- (d) After acquired water right.
- (e) Stock in ditch company does not make water appurtenant.
- (f) A right of way.

Covenant § 123.

- (a) "Together with water sufficient to irrigate said land."
- (b) Of warranty.
- (c) Imposing burden on land.

Description of water right in deed controls § 124.

Deed silent as to water right—Presumption § 125.

- (a) Intention governs.

Mechanics' lien § 126.

Mortgage § 127.

- (a) Of after acquired property by the officers of a corporation.
- (b) Release—Partial.
- (c) Statement in an application for loan.
- (d) Conspiracy by directors of a company in regard to mortgage.

Mutual Ditch company § 128.

- (a) Conveyance of stock conveys water.
- (b) Conveyance of part of water right.

Notice of easement—Perpetual right § 129.

Notice of sale of excess rights § 130.

Notice to purchaser § 131.

Oral contract to convey water § 132.

Riparian owner—Domestic purposes § 133.

Unpaid balance for water under contract—Sale of land—Agent § 134.

See Change of Point of Diversion, Sec. 104.

See Appropriation, Sec. 77.

Sec. 119. Conveyance of water may be made separate from land

"Even though under certain circumstances such rights may be considered appurtenant to the land—a point we do not decide—they may undoubtedly be severed from the land; and may be sold and conveyed separate and apart therefrom; and where such severance, sale and conveyance have taken place, as by the assignment and sale of stock representing water rights in an incorporated ditch company, a subsequent sale and conveyance of the land does not pass the title to such water right." *Oppenlander v. Left H. D. C. Co.*, 18 Colo. 142-151, 31 Pac. 854.

Syl. "A priority to the use of water for irrigation is a property right, and may be sold and transferred separate from the land in connection with which the right ripened." *Strickler v. City of Colo. Springs*, 16 Colo. 62; 26 Pac. 313.

Sec. 120. By delivery of certificates.

Syl. "Where a ditch company had issued certain certificates for perpetual water rights and recognized the transfer of said certificates without requiring a surrender of the certificates or that the transfers be made on the books of the company, it waived the requirement and a subsequent purchaser of the ditch and rights of the company under a deed that expressly reserved said certificates cannot object to such transfers." *Grand Valley I. Co. v. Leshner, et al.*, 28 Colo. 273, 65 Pac. 44.

Sec. 121. By deeds of trust.

a. Intention.

As to whether or not there was an intention to convey a water right by a deed of trust can only be raised between the parties to the transaction and not against a third party.

Oligarchy D. Co., et al. v. Farm I. Co., 40 Colo. 291-297, 101 Pac. 58; *Travelers' Ins. Co. v. Childs, Admr.*, 25 Colo. 360, 54 Pac. 1020.

b. On shares of stock.

A deed of trust does not convey stock in a ditch company by a general allegation of "all other stock," or similar language, while the stock itself remains untransferred. *Oligarchy D. Co. et al. v. Farm I. Co.*, 40 Colo. 291-297, 101 Pac. 58; *Travelers' Ins. Co. v. Childs, Admr.*, 25 Colo. 260, 54 Pac. 1020.

c. On after acquired water rights.

"That the interest in the ditch itself was not conveyed in any manner by the first deed of trust is apparent, because it is not specifically mentioned, and for the additional cogent reason that it was not in existence at that time, the ditch not even having been commenced." *Crippen v. Comstock*, 17 Colo. App. 88-92, 28 Pac. 469.

d. Statute of limitation.

If it could be construed as a chattel mortgage the statutory period of five years to run would not lie or be applicable. *Oligarchy D. Co. v. Farm I. Co.*, 40 Colo. 291-295, 101 Pac. 58; *Hall v. Johnson*, 21 Colo. 418, 42 Pac. 660.

e. Redemption.

If there was no change in trustee a change in the party who has the right to redeem does not matter. *Oligarchy D. Co., et al., v. Farm I. Co.*, 40 Colo. 291-295, 101 Pac. 58; *Ogilvy I. & L. Co. v. Insinger*, 19 Colo. App. 380-383, 75 Pac. 598.

Sec. 122. Appurtenance.

a. General doctrine.

See Water Rights, Sec. 308.

"We have repeatedly held, that: 'Although a water

right may be appurtenant to the land, it is the subject of property and may be transferred either with or without the land. *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313. Being therefore a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land.' *Arnett v. Linhart*, 21 Colo. 188, (40 Pac. 355); *Bessemer I. D. Co. v. Wooley*, 32 Colo. 437 (76 Pac. 1053)." *Cooper v. Shannon*, 36 Colo. 98-103, 85 Pac. 175; *Child v. Whitton*, 7 Colo. App. 117, 42 Pac. 601; *King v. Ackroid*, 28 Colo. 488, 66 Pac. 906; *Crippen v. Comstock*, 17 Colo. App. 89, 66 Pac. 1074; *Gelwicks v. Todd*, 24 Colo. 494, 52 Pac. 788; *Travelers' Ins. Co. v. Child, Admr.*, 25 Colo. 360, 54 Pac. 1020.

b. Easement may be.

See Easement, Sec. 164.

An easement may be appurtenant to land. The easement may be a perpetual right to water from a ditch. *Farmers' H. L. C. & R. Co. v. New Hampshire R. E. Co.*, 40 Colo. 467-481, 92 Pac. 290.

c. Need of water will not make it appurtenant.

In an action to determine whether or not water was meant to be conveyed as appurtenant to the land, the question as to whether or not the adverse claimant needs it for his land, can not be raised. *Cooper v. Shannon*, 36 Colo. 98-105, 85 Pac. 175; *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. 854.

d. After acquired water right.

"There must, before an after-acquired water right could become appurtenant to the land, have been manifested to

some extent, under the rule laid down by the supreme court, an intention that it should become so." *Crippen v. Comstock*, 17 Colo. App. 93, 66 Pac. 1074.

In the above case there were two deeds of trust. The first was silent as to the water right or ditch, but the "application" for a loan mentioned both. The ditch was not constructed or the water claimed until after the first deed of trust was given, and the water may not have been used on the land until after the second deed of trust was given. The deeds of trust were on adjoining parcels of land and owned by the same party. The second deed of trust specifically described the water right and the ditch.

e. Stock in ditch company does not make water appurtenant.

The right to water from a ditch company, by virtue of ownership of stock in the company, is not an appurtenance to the land upon which it is used. *Oligarchy D. Co., et al. v. Farm Inv. Co.*, 40 Colo. 291-297, 88 Pac. 443.

See Ditches, Sec. 156.

f. A right of way.

"A vested right to the use of water for milling purposes carries with it the appurtenant right of a right of way for a ditch through which to divert the water to the place of use, but it does not carry with it as an appurtenance a right to the land on which the mill is constructed." *Cleary v. Skiffich, et al.*, 28 Colo. 362-363, 65 Pac. 59.

Sec. 123. Covenant.

a. "Together with water sufficient to irrigate said land."

"It is doubtful if the covenant, * * * * could be construed as evidencing the intention of the parties * * * * to convey * * * the * * * right to the use of enough water to irrigate the * * * tract sold, regardless of the rights of other consumers in the ditch, or the state of the water in the stream * * * or the rights of prior appro-

priators from the same source of supply." *Booth v. Trager*, 44 Colo. 409-410, 99 Pac. 60.

In the above case, it was found that the grantee, under the deed containing said covenant, was entitled to the proportion of water which the land he received bore to the land for which the appropriation was made. *Id.*, 412; *Grand Valley I. Co. v. Leshner, et al.*, 28 Colo. 273-288, 65 Pac. 44.

b. Of warranty.

The grantor is not liable or responsible for the wrongful diversion by subsequent appropriators. *Booth v. Trager*, 44 Colo. 409-412, 99 Pac. 60.

c. Imposing burden on land.

"A covenant imposing a burden will run with the land as readily as one conferring a benefit." *Farmers' H. L. C. & R. Co. v. New Hampshire R. E. Co.*, 40 Colo. 467-468, 92 Pac. 290.

Sec. 124. Description of water right in deed controls.

The intention of the parties being expressed, no implication as to other water rights arises. *Davis v. Randall*, 44 Colo. 488-494, 99 Pac. 322.

A grantee is bound and limited by the description, if any, of water rights in the deed. The doctrine of appurtenance or implied grant can only be invoked when the deed is silent as to water. *Gelwicks v. Todd*, 24 Colo. 494-497, 52 Pac. 788. Overruling *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846.

Sec. 125. Deed silent as to water right—Presumption.

"When it (deed) is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land (controls.)" *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Crippen v. Comstock*, 17 Colo. App. 89-93, 66 Pac. 1074.

a. Intention governs.

Where the deed to the land is silent as to the water, the intention controls. *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175; *Travelers' Ins. Co. v. Child, Admr.*, 25 Colo. 360, 54 Pac. 1020; *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Child v. Whiton*, 7 Colo. App. 117, 42 Pac. 601; *King v. Ackroid*, 28 Colo. 488, 66 Pac. 906; *Crippen v. Comstock*, 17 Colo. App. 189, 66 Pac. 1074; *Bessemer I. D. Co. v. Woolley, et al.*, 32 Colo. 437, 76 Pac. 1053.

"Where a party owned a half interest in a certain irrigating ditch and the water decreed to said ditch, which he used to irrigate certain land, and also owned twenty inches of water decreed to another ditch, which by consent of the parties interested he diverted through the former ditch and used in irrigating the same land, a deed conveying said land together with one-half interest in the ditch and 'one-half interest in the water belonging to said ditch or that is entitled to run through the same, either by decree, appropriation or ownership,' conveyed the twenty inches of water." *Fluke, et al. v. Ford*, 35 Colo. 112, 84 Pac. 469; *Arnett v. Linhart*, 21 Colo. 188-190, 40 Pac. 355.

Sec. 126. Mechanics' lien.

"Thus a mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage." *Jarvis v. State Bank*, 22 Colo. 309-318, 45 Pac. 505.

Sec. 127. Mortgage.**a. Of after acquired property by the officers of a corporation.**

See Pleading and Practice, Sec. 234e.

"Where a ditch company mortgaged its entire line of ditch, * * * then in existence or thereafter to be constructed * * * and after constructing several miles of ditch and using all the money borrowed from the mortgagee in the

construction thereof the pumping plant proved to be inadequate to supply the ditch with water and the work was abandoned, and the principal officers of the mortgagor company organized another company and with their own money, and without using any of the mortgagor's money for the purpose, constructed another ditch at great cost to conduct water to the mortgagor's ditch and through it to water the lands intended to be watered by mortgagor's ditch, and with the intention of deeding the last ditch, when completed, to the mortgagor, the mortgagor company had neither a legal nor an equitable interest in the ditch constructed by the new company, and the mortgage lien did not extend to such ditch, and the fact that the officers of the mortgagor company were also officers of the new company did not estop the new company from acquiring a separate and distinct appropriation of water from that of the mortgagor company." *Farm I. Co., et al. v. Alta L. & W. Co.*, 28 Colo. 408-409, 65 Pac. 22.

Syl. "Where apt words are used in a mortgage, property acquired by the mortgagor subsequent to its execution may become subject to the mortgage, but property standing in the name of some person other than the mortgagor, cannot become subject to the lien of the mortgage unless the mortgagor has a legal or equitable interest therein." *Id.* 408.

"The court was right in decreeing that the subsequently acquired lands came within the provisions of the first mortgage. * * * The facts are that the stockholders of the original company, becoming satisfied that their investment could not be made profitable without buying additional lands, one of them * * * surrendered a portion of (his) * * * stock to the * * * trustee under the first mortgage, which, it is claimed, purchased this land, and took title to the same in the * * * (mortgagor)." The stockholder who held the equitable right to the subsequently acquired land did not complain, and it was held that a subsequent purchaser of all the property could not complain. *Lamar L. & C. Co. v. Belknap Savings Bank*, 28 Colo. 344-347, 64 Pac. 210.

b. Release—Partial.

Syl. "Where a mortgage provides for a release therefrom of certain parts of the property upon certain conditions, releases can be made only in strict conformity with the terms of the mortgage." *Id.* 345.

c. Statements in application for loan.

Statements, in an unrecorded application for a loan, in regard to water rights, will not bind a subsequent mortgagee, provided said rights were afterwards acquired. *Crippen v. Comstock*, 17 Colo. App. 89, 66 Pac. 1074.

d. Conspiracy by directors of a company in regard to mortgage.

Syl. Where a canal company sold water rights * * * and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operating the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water right owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system. *New La Junta & L. C. Co. v. Kreybill*, 17 Colo. App. 26-27, 67 Pac. 1026; *Henry v. Travelers' Ins. Co.*, 16 Colo. 179-186, 26 Pac. 318.

Sec. 128. Mutual ditch company.**a. Conveyance of stock conveys water.**

"But where * * * * the water rights, and the ditch through which they are enjoyed, are owned by the same persons as tenants in common, and for their mutual convenience they organize a corporation and convey to it the ditch

and water rights, and the corporation issues to the consumers its capital stock, which represents and stands for, not only the rights of the parties in the ditch, but, by a mutual arrangement, also represents the right to the use of water, or the priority right, then this stock (while not, of course, constituting the ditch or priority to the use of water) does represent both the ditch and that priority, and a transfer of the stock operates as a transfer of both kinds of property." *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144-147, 53 Pac. 318, sustaining 8 Colo. App. 237, 45 Pac. 525.

b. Conveyance of part of water right.

"If one consumer did not need, or use all that his stock entitled him to; or if, by sale of a portion of his lands, his necessity was less or * * * if he owned more water than land, he might lawfully sell the excess of water, or lease it, or permit his co-tenants to use it, before any subsequent appropriation attached thereto and of this, junior appropriators may not complain." *Cache la Poudre I. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144-150, 53 Pac. 318.

Sec. 129. Notice of easment—perpetual right.

Contract—"This is to certify that is entitled to and is the owner of water rights of in ditch, and the same is free from all dues and assessments and transferable only on the books of the company on the surrender of this certificate. In Witness Whereof, etc." *Grand Valley I. Co. v. Lesher, et al.*, 28 Colo. 273-276, 65 Pac. 44.

"The company by this certificate acknowledges an obligation to deliver water through ditch. Such an acknowledgment in writing is a conveyance in writing of an easement in the ditch."

Id. 287.

If at the time of purchase, a deed of trust, under which the purchase was made, reserved certain perpetual rights, and

the articles of incorporation, which were recorded, provided for such perpetual rights, and that certificates for said perpetual rights had been issued, and that said rights had been conveyed, and lateral ditches and headgates and cultivated lands thereunder existed and were known, it is sufficient to put the vendee upon inquiry. *Id.* 289.

Sec. 130. Notice of sale of excess rights.

If the contracts of purchase disclose that the vendor can only sell rights within the estimated capacity of a canal, then the vendee or purchaser is put upon inquiry as to whether or not more than the estimated capacity of the canal has been previously sold. *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-235, 73 Pac. 249.

Sec. 131. Notice to purchaser.

"The open and notorious possession and user of water from an irrigation canal through lateral ditches is constructive notice to a purchaser of the rights of a party so in possession and using the water." *Park v. Park, Ex.*, 45 Colo. 347-355, 101 Pac. 403; *McClure v. Keon*, 25 Colo. 284, 53 Pac. 1058.

Sec. 132. Oral contract to convey water.

See Canal Companies, Sec. 95.

"Oral agreements concerning priorities and title to water rights followed with its change of possession and application by the claimant have heretofore been held valid by this court, also that part performance will take it out of the statute of frauds and equity will enforce the right thus acquired." *Park v. Park, Ex.*, 45 Colo. 347-356, 101 Pac. 403; *Schilling, et al. v. Rominger*, 4 Colo. 100-104; *McLure v. Keon*, 25 Colo. 284, 53 Pac. 1058.

"The transfer of water, in order to avoid the statute of frauds, should be in writing, signed by the party making it; but a stranger to such an agreement can not object that

it was not so evidenced. That question is purely personal, and can not be raised by those who were neither parties nor privies to the agreement." *Daum, et al. v. Conley, et al.*, 27 Colo. 56-64, 59 Pac. 753.

Sec. 133. Riparian owner—Domestic purposes.

A riparian owner can not convey water for domestic purposes separate and apart from land. *Broadmoor S. Co. v. Brookside W. Co.*, 24 Colo. 541, 52 Pac. 792; *Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-428, 94 Pac. 339.

Sec. 134. Unpaid balance for water under contract—Sale of land—Agent.

Syl. "The owner of a tract of land gave to the agent of the party who subsequently purchased it a written option to purchase in the name of the agent at a certain price. The owner had contracted with the water company to supply the land with water for irrigation, on installments, part of which had been paid, but no mention of the water right was made in the option to purchase. The sale was made, and the land conveyed direct to the purchaser without an assignment of the water right, or any contract in regard to it. Under such circumstances the presumption is that the future payments on the water rights were to be made by the purchaser.

"In no event could the agent maintain an action against the grantor for recovery of the unpaid installments. Having obtained merely an option to purchase he acquired thereby no right individually to the water, separated from the land, and even if there had been a covenant for and conveyance of the water right, the agent could not recover the amount of the unpaid installments, as neither land nor water was conveyed to him." *Chamberlain v. Auster*, 1 Colo App. 13, 27 Pac. 87.

CHAPTER VIII.

DAMAGES.

Complaint in action for § 135.

In condemnation proceedings—Conclusiveness of judgment § 136.

Instructions § 137.

Measure of § 138.

(a) Destruction of a ditch.

Mortgage—Action brought before maturity of debt § 139.

Overflowing ditch § 140.

Permanent improvements § 141.

To growing crops—Mortgagee § 142.

Trespass § 143.

See Reservoirs, Sec. 257.

Sec. 135. Complaint in action.

See Northern C. I. Co. v. Richards, 22 Colo. 450-461, 45 Pac. 423.

Sec. 136. In condemnation proceedings—Conclusiveness of judgment.

Syl. "A judgment is conclusive between the parties not only as to such matters as were in fact determined in the proceeding, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of litigation, whether the same, as a matter of fact, were or were not considered." *Denver C. I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565.

See Eminent Domain, Sec. 175.

Sec. 137. Instructions in action for damages.

"In passing upon the question of damages, and in considering the evidence, you may consider whether or not the plaintiff might have obtained water through another ditch

readily and at slight expense; and if he could have obtained sufficient water through some other source to have prevented the injury, he is not entitled, it seems to me, to recover a greater sum than it would, under the evidence, have reasonably required for him to have expended in procuring the water from such other source, thereby preventing the injury complained of in this case." *Mack v. Jackson*, 9 Colo. 537, 13 Pac. 542.

See Northern C. I. Co. v. Richards, 22 Colo. 450-461, 45 Pac. 423.

Sec. 138. Measure of.

a. Destruction of ditch.

"The difference in the value of the land without the ditch and with the ditch was the measure of damage." *Denver, etc., R. R. Co. v. Dotson*, 20 Colo. 304, 38 Pac. 322; *Cash v. Thornton*, 3 Colo. App. 475, 34 Pac. 268.

Sec. 139. Mortgage—Action brought before maturity of debt.

Syl. "An action by a mortgagee for damages is not premature because brought before the maturity of the mortgage debt." *Equitable S. Co. v. Montrose & D. C. Co.*, 20 Colo. App. 465, 79 Pac. 747.

Sec. 140. Overflowing ditch.

"It can, without doubt, be said that the defendants are responsible for any damage occasioned to the plaintiff's property by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so maintain and manage the ditch as to prevent injury to plaintiff's property caused by overflow of the waters entering the ditch, resulting either directly or indirectly from the negligence of the defendants in keeping the same in good repair, or in the manner of its use, while under their control, they are responsible in damages. * * * 37 Cal. 263." *Greeley I. Co. v. House*, 14 Colo. 549-553-554, 24 Pac. 329.

Sec. 141. Permanent improvements.

Damages will not be allowed. *Farmers' H. L. C. & R. Co. v. New Hampshire R. E. Co.*, 40 Colo. 467, 92 Pac. 290.

Sec. 142. To growing crops—Mortgagee.

An action for damages to growing crops occasioned by a canal company, the defendant, refusing to furnish water until the applicant had paid arrearages of his grantor. Syl. "The mortgagee, in a chattel mortgage on growing crops, may maintain an action for damages for impairment or destruction of his security against the water company which refused to supply water to the mortgagor and thus destroyed the crops." *Equitable S. Co. v. Montrose & D. C. Co.*, 20 Colo. App. 465, 79 Pac. 747.

Sec. 143. Trespass.

Syl. "For trespasses or nuisances that are not of a permanent character damages can only be recovered for the injury sustained up to the time of the commencement of the suit; but as to trespasses and nuisances that are of a permanent character, a single recovery may be had for the whole damage resulting from the act." *Denver C. I. & W. Co. v. Middaugh*, 12 Colo. 434-435, 21 Pac. 565.

CHAPTER IX.

DISTRIBUTION.

Bonus or condition precedent § 144.

Change of character of use or place of diversion § 145.

Commingle waters—Rights in § 146.

Decree controls § 147.

Extension of ditch—Relative rights of consumers § 148.

Loan of water § 149.

- (a) Injurious effect.
- (b) Party to defend rights.
- (c) Statutes relating to loan of water.
- (d) When loan of water cannot be made.

Method of carrying water § 150.

Pollution of stream § 151.

- (a) By alkali.
- (b) By a licensee.
- (c) Supreme court's jurisdiction.

Pro-rating § 152.

- (a) Among consumers from same ditch.
- (b) Cannot be construed so as to interfere with existing rights.
- (c) Parties to suit for pro-rating.
- (d) Proof in action for pro-rating.

State officers duties § 153.

Waste—Prohibited § 154.

See Subterranean Waters, Sec. 283.

Sec. 144. Bonus or condition precedent.

A *bonus or royalty* can not be charged by a ditch company as a condition precedent to furnishing water. *Northern Colo. I. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423; *Wheeler v. Northern Colo. I. Co.*, 10 Colo. 582, 17 Pac. 487.

See Canal Companies, Sec. 92.

Sec. 145. Change of character of use or place of diversion.

See Change of Point of Diversion, Sec. 103.

See Secs. 255, 67, 68.

"It is further manifest that after the plaintiff made its appropriation, while the milling company may change the character of its use, or the place of diversion, it may not do so to the injury of the former. *Strickler v. City of Colo. Springs*, 16 Colo. 61, 36 Pac. 313." *Cache la Poudre I. Co. v. Water S. & S. Co.*, 25 Colo. 161-169, 53 Pac. 331.

Sec. 146. Commingled waters—Rights in.

"The fact that the waters of the reservoir and canal companies might have been commingled, as alleged, gave the defendants no right to divert water which did not belong to them. It was the duty of the irrigation company, as stated by the trial judge in finally disposing of the case, to put in measuring weirs, so that the water flowing in the canal, when commingled, could be properly distributed; but the failure of the irrigation company to discharge its duty in this respect did not invest the defendants with the right to take water which did not belong to them." *Hackett v. Larimer & Weld Co.*, 48 Colo. 178-186, 109 Pac. 965.

"The commingling of the two classes of water did not give the defendants any right to divert water in which they had no interest." *Id.* 188.

Sec. 147. Decree controls.

"The distribution of water * * * * must be made in accordance with the decrees of the court in the statutory proceeding, and not otherwise." *Combs, et al. v. Farmers' H. L. C. & R. Co.*, 38 Colo. 420-432, 88 Pac. 396.

The waters of a stream must be distributed in accordance with the decreed priorities, regardless of the fact that the stream may run in two or more districts and that an adjudication has been had in each and regardless of the fact that an injunction has been obtained against a water commissioner by a party in one district to compel him to distribute the waters

in accordance with the decrees of that district. The decrees of all the districts in a division will be considered in making distribution. *Lower Latham D. Co. v. Loudon I. C. Co. et al.*, 27 Colo. 267-270, 60 Pac. 629.

"This court has held that the decrees of the several districts taking water from the same general source are *prima facie* evidence as between such districts. We have also decided that it is the duty of the superintendent of irrigation for a water division to distribute the waters of the streams of his division in accordance with the adjudication decrees of the water districts included therein, so that, in effect, the various decrees in a water division are to be treated as one, and water distributed accordingly." *Ft. Lyon Co. v. Ark. Co.*, 39 Colo. 332, 337, 90 Pac. 1023.

Sec. 148. Extension of ditch—Relative rights of consumers.

"The fact that a canal as originally built was decreed a prior water right over an extension thereof, does not give a consumer from the original canal priority over a consumer from the extension, where the latter consumer made a prior use of the water, since the beneficial application in each instance completed the appropriation." *O'Neill, et al. v. Ft. Lyon C. Co., et al.*, 39 Colo. 487-488, 90 Pac. 849.

Sec. 149. Loan of water.

See State Officers, Secs. 278, 280c.

a. Injurious effect.

"But if his use of water, by himself, or others with his consent, either by diverting and applying a larger volume than his priority calls for, or by using his decreed volume for a longer time than his needs require * * * this act would, in time of shortage, injuriously affect the rights of other appropriators." *Ft. Lyon C. Co. v. Chew, et al.*, 33 Colo. 392-401, 81 Pac. 37.

b. Party to defend rights.

"It is incumbent upon the party asserting rights under the loan or exchange, when challenged by an action in court, affirmatively to show that it can be exercised without interfering with, or impairing, the rights of others." *Id.* 402.

c. Statutes relating to loan of water.

See Sec. 323z.

d. When loan of water cannot be made.

"So long as it is used in connection with a given tract of land, it cannot be made to do duty to that particular tract, and, when no longer needed therefor * * * * loaned to some third person, to the injury of the rights of other appropriators." *Ft. Lyon C. Co. v. Chew, et al.*, 33 Colo. 392-400, 81 Pac. 37.

A loan of water may be made without a decree therefor, but if an action is brought to enforce said loan the complaint must allege and it must be proven that such loan will not injuriously affect the rights of others. *Brown, et al. v. Birdin, et al.*, 40 Colo. 247, 90 Pac. 506.

Sec. 150. Method of carrying water.

Syl. "The mere fact that a person, by parol agreement with a neighbor, obtained his water for several years through the latter's ditch, does not affect his right to receive water through his own ditch as against the neighbor's grantee." *Greer v. Heiser*, 16 Colo. 307, 26 Pac. 770.

Sec. 151. Pollution of stream.**a. By alkali.**

"There is no question that riparian owners and these prior appropriators of water are entitled to have * * * creek flow unimpaired in quantity, and unpolluted in any permanent

and unreasonable way." *Cushman v. Highland D. Co.*, 3 C. A. 437-439, 33 Pac. 344.

b. By a licensee.

If water is appropriated for placer mining and subsequently is used for irrigation before being returned to the river by a party without any contract with the owners of the placer right and the water becomes polluted by placer mining and rendered unfit for irrigation, the party using it for irrigation can not be heard to complain as he is a mere licensee. *Fairplay H. M. Co. v. Weston*, 29 Colo. 125, 67 Pac. 160.

c. Supreme court's jurisdiction.

The Supreme Court will not assume original jurisdiction of matters regarding pollution. *People, et al. v. Rogers*, 12 Colo. 278, 20 Pac. 702.

Sec. 152. Pro-rating.

a. Among consumers from same ditch.

"It therefore may be considered as *stare decisis* in this jurisdiction that there may be circumstances in which water consumers from the same ditch, may not be compelled to pro-rate with each other." *Farmers' H. L. C. & R. Co., et al. v. White, et al.*, 32 Colo. 114-119, 75 Pac. 415; *Brown, et al. v. Farmers' H. L. C. & R. Co.*, 26 Colo. 66-67, 56 Pac. 183.

b. Cannot be construed so as to interfere with existing rights.

Syl. "The most favorable view that can be taken of the pro-rating act of 1879 is that in times of scarcity of water it may be invoked to compel the pro-rating of water among consumers having priorities of the same, or nearly the same, date. It can not be so construed as to interfere with the constitutional rights of prior appropriators." *Larimer & Weld I. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. 528.

c. Parties to suit for pro-rating.

^{1. 2.} All parties claiming a right to pro-rate are necessary parties defendant. The company cannot represent those not made parties. It should be neutral. *Farmers' H. L. C. & R. Co., et al. v. White, et al.*, 32 Colo. 114-123, 75 Pac. 415; *Brown, et al. v. Farmers' H. L. G. & R. Co.*, 26 Colo. 66-67, 56 Pac. 183.

d. Proof in action for pro-rating.

"That the time when their rights accrued, and that plaintiff's rights are so superior to defendants' as to authorize a decree preventing the carrier from compelling a pro rating in time of scarcity, have not been proved by that preponderance which should attend such a case, we are entirely clear." *Farmers' H. L. C. & R. Co., et al. v. White, et al.*, 32 Colo. 114-120, 75 Pac. 415; *Brown, et al. v. Farmers' H. L. C. & R. Co.*, 26 Colo. 66-67, 56 Pac. 183.

"Dates when they (priorities) attached, the amount of water they are entitled to receive, and the same data with respect to rights of defendants, which are said to be inferior * * *." *Farmers' H. L. C. & R. Co. v. White, et al.*, 32 Colo. 114-121, 75 Pac. 415; *Brown v. Farmers' H. L. C. & R. Co.*, 26 Colo. 66-67, 56 Pac. 183.

Sec. 153. State officers duties.

See State Officers.

Water will be distributed by the division engineer in accordance with the dates of priority decrees in the various districts. A stream flowing in more than one district has its waters distributed by the division engineer in accordance with the dates of the priorities of the different ditches. The numbers of priorities as given in a decree in a district do not control or have any effect in the distribution, if the stream flows in more than one district. In that event the dates of priority in the whole division control. *Lower Latham D. Co. v. Lowden I. C. Co., et al.*, 277 Colo. 267, 60 Pac. 629.

Sec. 154. Waste prohibited.

The waste of water must be guarded against. *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-430, 94 Pac. 339.

CHAPTER X.

DITCHES.

Enlargement and use by others § 155.

Interests therein—How transferred § 156.

Repair of § 157.

Estimated capacity § 158.

Stream abandoning its former course § 159.

Sec. 155. Enlargement and use by others.

See Subterranean Waters, Secs. 284e, 284g.

See Taxation.

See Appropriation, Sec. 86c.

Syl. "The statutory right to enlarge and use the ditch of another applies, however, only to such ditches as have been constructed *through* lands for the benefit of adjoining proprietors, and not to those constructed by the owner of land to water his own land exclusively." Modifying 7 Colo. 72, 1 Pac. 695; *Downing v. More*, 12 Colo. 316, 20 Pac. 766.

Syl. "The right of the owner of an irrigation ditch with respect to adjoining lands may be limited or curtailed by the action and acquiescence of the parties." *Arthur Irr. Co. v. Strayer, et al.*, 115 Pac. (Colo.) 724.

Syl. "Defendant secured a right to construct an irrigation ditch through certain land when it was largely vacant and unoccupied. For many years the ditch owners did not attempt to utilize any lands on either side of the ditch, between the points in controversy, and fifteen years after its construction, and while such conditions continued, the owners of the adjoining land platted the same into lots and blocks, and caused it to become part of a city. * * * *Held*, That defendant was estopped to claim a right to improve the ditch by widening it to the injury of such improvements." *Id.* 724.

See Water Rights, Sec. 308.

Sec. 156. Interests therein—How transferred.

"The law recognizes but two ways of acquiring, by purchase, an ownership interest in such a ditch. One is by deed or prescription, which presupposes a grant, and the other is by condemnation. An interest in such a ditch is an interest in realty. It can not pass by a mere verbal sale. * * * *43 Cal. 371." *Burnham v. Freeman*, 11 Colo. 601-606, 19 Pac. 761.

"The repairs or improvements made upon the ditch * * * did not invest the plaintiff * * * with an ownership in the ditch, and no verbal declarations of * * * * could do so; nor did the use of water from such ditch, with the consent of the defendants, to water the land owned by plaintiff operate to convey an interest in the ditch to the plaintiff. * * * *"

Id. 606.

Sec. 157. Repair of.

See Damages, Sec. 143.

Sec. 158. Estimated capacity.

Estimated capacity does "not mean alone the physical capacity of the ditch to convey water, but the capacity of the ditch and stream from which the water was taken to furnish water during the season of irrigation." *Larimer & Weld I. Co. v. Wyatt*, 23 Colo. 480-481, 48 Pac. 528.

Sec. 159. Stream abandoning its former course.

"When the river abandoned its original course, the bed over which it formerly flowed became part of the surrounding land. At the time the change occurred the title was in the United States." *Boglino v. Giorgetta*, 20 Colo. App., 338-343, 78 Pac. 612.

CHAPTER XI.

DIVIDE.

Conveying water across a divide § 160.

Sec. 160. Conveying water across a divide.

“The right to divert and convey the water of a natural stream across an intervening ‘divide’ to be used for the irrigation of lands in the valley of another natural stream * * * has been distinctly recognized by this court. * * *. *Coffin v. Left Hand D. Co.*, 6 Colo. 440.” *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142-144, 31 Pac. 854.

CHAPTER XII.

EASEMENT.

Abandonment of § 161.

Across an easement § 162.

Contract for § 163.

(a) May be contract for water from ditch.

(b) Not in writing.

Conveyance of—As an appurtenance § 164.

Created by contract § 165.

Equity jurisdiction in action to protect § 166.

Notice to purchaser § 167.

Perpetual right in easement § 168.

Possession § 169.

Prescription § 170.

Right of way § 171.

(a) For ditch is an easement.

(b) Given after trust deed.

(c) Not title in fee.

Specific performance—Action to enforce § 172.

Title to revert § 173.

Time when acquired § 174.

Sec. 161. Abandonment of.

See Abandonment, Sec. 3b-5.

Sec. 162. Across an easement.

An easement may be granted, over and across an easement existing, to the owner of the land originally condemned, provided the existing easement be not interfered with. *Smith C. or D. Co. v. Colo. I. & S. Co.*, 34 Colo. 485-495, 82 Pac. 940.

Sec. 163. Contract.

(a) An easement may be a contract for water from a ditch. *Farmers' H. L. C. & R. Co. v. New Hampshire R. E. Co.*, 40 Colo. 467-478, 92 Pac. 290.

(b) Not in writing.

See Secs. 95, 132.

Sec. 164. Conveyance of—as an appurtenance.

See Conveyance, Secs. 122a, 122b.

“An easement * * * may pass as an appurtenance to the dominant estate without specific mention in the deed conveying such estate. It does so pass provided such was the intention of the grantor. The deed being silent, such intention is gathered from the presumptions arising from the circumstances surrounding the transaction. * * * 21 Colo. 188, 40 Pac. 355; 4 Wyo. 503, 35 Pac. 475; 24 Colo. 494, 52 Pac. 788; * * * 25 Colo. 360, 54 Pac. 1020.” *Garfield Co. v. Beardsley*, 18 Colo. App. 53-55, 70 Pac. 229.

Sec. 165. Created by contract.

An easement may be created by a contract and where the time which it is to run is not specified it may be held to exist during the time the ditch—subject of the easement—is used as a water carrier. *Chicosa I. D. Co. v. El Moro D. Co.*, 10 Colo. App. 276, 50 Pac. 730; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo. 298, 33 Pac. 144.

Sec. 166. Equity jurisdictions in actions to protect.

See Pleading and Practice, Sec. 222a.

Sec. 167. Notice to purchaser.

“It is insisted that the defendant (purchaser) took the land without notice of the easement and therefore discharged thereof. * * * This open, visible use of the easement charged defendant with notice * * *. * * * 25 Colo. 284, 53 Pac. 1058; * * * 28 Colo. 273, 65 Pac. 44; * * * 17 Colo. App. 26, 67 Pac. 1026.” *Croke v. Am. Natl. Bank*, 18 Colo. App. 3-7, 70 Pac. 229.

The recording of a contract in which is incorporated

a contract for an easement constitutes constructive notice. *Farmers' H. L. C. & R. Co. v. New Hampshire R. E. Co.*, 40 Colo. 467, 92 Pac. 290.

Sec. 168. Perpetual right an easement.

See Abandonment, Sec. 3b-5.

The perpetual right to have water carried by a ditch constitutes an easement in the ditch. *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. 415; *Grand Valley I. Co. v. Leshner, et al.*, 28 Colo. 273, 65 Pac. 44.

Syl. "A perpetual right to have a certain quantity of water flow through an irrigation ditch is an easement in the ditch." *Grand Valley I. Co. v. Leshner, et al.*, 28 Colo. 273-274.

Syl. "A perpetual right to the use of water from an irrigating ditch, acquired or reserved under a contract, constitutes an easement in the ditch, which cannot be lost by non-user alone, short of the period of limitations for actions to recover real property." *People v. Farmers' H. L. C. Co.*, 25 Colo. 202, 54 Pac. 626; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo. 298, 33 Pac. 144.

Sec. 169. Possession.

"It is, of course, impossible for the owner of an incorporeal right, like an easement, to have and maintain physical possession of it. The only possession of which it is susceptible is that constructive possession which necessarily follows ownership of the easement itself or of the principal thing to which it may pertain." *Gutheil Park Inv. Co. v. Montclair*, 32 Colo. 420-427, 76 Pac. 1050.

Sec. 170. Prescription.

See Prescriptive Right.

Syl. "In the same case held that the taking and use of water from the ditch, for long series of years, without objection from the owners of the reservoir—it not appearing that

any water derived from the reservoir was so taken and used—was held not to confer an easement by prescription, as against the reservoir company, nor convict it of laches, even though the waters accumulated in the reservoir were, when turned into the ditch, so mingled with other waters as to make it impossible to determine what proportion thereof was obtained from the reservoir." *Hackett v. Larimer & Weld Co.*, 48 Colo. 179, 109 Pac. 965.

Sec. 171. Right of way.

a. For ditch is an easement.

"A right of way for an irrigation ditch is an easement. An easement is a charge or burden upon the land of one for the benefit of another." *Blake, et al. v. Boye, et al.*, 38 Colo. 55-62.

b. Given after trust deed.

"Where, after the recording of a trust deed, a subsequent grantor of the land granted a right of way for a ditch, after foreclosure of the trust deed, such easement was terminated, and the lands passed to the purchaser free from any rights of the ditch owners." *Burlington & C. R. R. Co. v. Colo. Eastern R. R. Co.*, 38 Colo. 95, 88 Pac. 154.

c. Not title in fee.

A right of way for a ditch under condemnation proceedings conveys an easement only and not a title in fee. *Smith C. or D. Co. v. Colo. I. & S. Co.*, 34 Colo. 485-494, 82 Pac. 940.

Sec. 172. Specific performance—action to enforce.

See Evidence, Sec. 185.

Sec. 173. Title to revert.

A provision in a deed that the right of way for an easement will revert upon the happening of a certain contingency

is a limitation and not a condition subsequent. "Upon the happening of the event provided, the control and use of the land would pass to the owner of the fee without entry or claim." *Burlington & Colo. R. R. Co. v. Colo. Eastern R. R. Co.*, 38 Colo. 95-100, 88 Pac. 154.

Sec. 174. Time when acquired.

An easement can be acquired prior to the vesting of the right to water. *Schneider v. Schneider*, 36 Colo. 518-522, 86 Pac. 347.

CHAPTER XIII.

EMINENT DOMAIN.

Damages § 175.

For private use § 176.

What to be and not be determined in condemnation § 177.

Sec. 175. Damages.

See Damages Sec. 136.

Syl. "In condemnation proceedings all damages, present and prospective, that are the natural, necessary or reasonable incident of the improvement must be assessed, not including such as may arise from negligent or unskillful construction or use thereof.

In assessing damages for lands taken for the construction of a canal or reservoir thereon, injuries to the residue of such lands arising from seepage or leakage from such canal or reservoir should be anticipated, and damages for the same should be included in the original assessment; and no subsequent recovery for such injuries will be allowed, unless such negligence or unskillfulness be shown." Justice Elliott dissented. *Denver C. I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565.

Sec. 176. For private use.

"The right of a purely private party to condemn a right of way for a ditch to convey water to his lands for domestic, agricultural and mining purposes is guarantied by the constitution. * * * * * *Downing v. More*, 12 Colo. 318 20 Pac. 766. *Ortiz v. Hansen*, 35 Colo. 100-102, 83 Pac. 964.

Sec. 177. What to be and not to be determined in condemnation.

"As to whether or not there is sufficient water for plaintiff's use, or as to whether or not the plan is a practicable or feasible one, is a matter which can not be determined in a proceeding of this character." *Schneider v. Schneider*, 36 Colo. 518-522, 86 Pac. 347.

"The various questions which may arise as to the right to appropriate the water cannot be here determined." *Id.* 522.

"It is solely the province of petitioner to determine the feasibility of constructing the proposed ditch or reservoir." *Gibson v. Cann*, 28 Colo. 499-501.

"The question of necessity in condemnation proceedings presents itself in various aspects. What is proper to consider in determining this question will vary according to the circumstances in each particular case." *Id.* 501.

CHAPTER XIV.

EVIDENCE.

Of abandonment § 178.

Admission—In complaint in former suit § 179.

Adjudication—Testimony in § 180.

Burden of proof § 181.

(a) Of abandonment.

(b) Of right under abandonment.

(c) Of abandonment of part of a water right.

(d) That percolating water augments flow of stream.

(e) That tributary does not reach main stream.

(f) That volume not diminished by diversion from tributary.

Change of diversion § 182.

Data of water commissioner § 183.

Declarations § 184.

Easements—Parole grants § 185.

In action relating to pro-rating of water § 186.

Intention § 187.

Objections to evidence—Main point in issue § 188.

Objections to evidence in an equity case § 189.

Of decree § 190.

Of written instruments—Oral—To contradict § 191.

Of quantity of water flowing in a stream § 192.

Of title to water § 193.

(a) Possession and use prima facie.

(b) Title to land not proof.

Voluminous documents § 194.

(a) Oral.

(b) Best—Secondary.

Sec. 178. Of abandonment.

See Water Rights, Sec. 308.

See Appropriation, Sec. 70c.

See Changing Point of Diversion, 106b.

See Distribution, Sec. 152d.

Sec. 178. Abandonment.**a. Intention.**

See Abandonment, Sec. 4.

b. Non-user.

See Abandonment, Sec. 3b.

Sufficiency of evidence to support abandonment.

See 32 Cal. 26; 13 Cal. 33; 27 Cal. 360; 20 Wall. 507; 7 Colo. 148, 2 Pac. 901; The foregoing cases are cited in *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-365; 40 Pac. 989; *Beaver Brook R. Co. v. St. Vrain R. Co.*, 6 Colo. App. 130, 40 Pac. 1066. *Hall, et al. v. Lincoln, et al.*, 10 Colo. App. 360-364, 50 Pac. 1047. *Colo. L. & W. Co. v. Rocky Ford, etc., Co.*, 3 Colo. App. 545, 34 Pac. 580.

See Sec. 4b2.

Sec. 179. Admission—In complaint in former suit.

A complaint in a former and different suit is admissible to show "admissions against interest." *Boulder & W. R. D. Co. v. Leggett C. D. & R. Co.*, 36 Colo. 455-458, 86 Pac. 101.

Sec. 180. Adjudication—Testimony.

Testimony taken in an adjudication proceeding may be used as evidence in an action between the claimants under a ditch to determine the amount of water to which each is entitled. *Woods v. Sargent, et al.*, 43 Colo. 268-272, 95 Pac. 932.

The "files" of the clerk are presumed to be correct. *Id.* 273.

Sec. 181. Burden of proof.**a. Of abandonment.**

The burden of proof of abandonment is on the party

alleging it. *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-143, 93 Pac. 1112.

b. Of right under abandonment.

"In claiming a right under abandonment, the burden of proof is upon the party asserting it, and before it can be sustained, the abandonment must be shown by a preponderance of proof." *Hall, et al. v. Lincoln, et al.*, 10 Colo. App. 360-364, 50 Pac. 1047; *Beaver Brook R. Co. v. St. Vrain R. Co.*, 6 Colo. App. 130, 40 Pac. 1066; *Farmers' H. L. C. & R. Co. et al. v. White, et al.*, 32 Colo. 102, 75 Pac. 391.

c. Of abandonment of part of water right.

"To prove the intention with which the owner seeks to use a part of the volume after the decree was entered, it is competent to show a similar state of facts before its rendition." *Alamosa C. C. Co. v. Nelson*, 42 Colo. 140-147, 93 Pac. 1112.

d. That percolating water augments flow of stream.

See Subterranean Waters, Sec. 284.

The burden of proof is on the party alleging that percolating water will not augment the flow of a stream. *Patterson v. Paine Water Com., et al.*, 43 Colo. 184-187, 95 Pac. 301.

e. That tributary does not reach main stream.

Syl. "In an action where plaintiff sought to restrain defendants from diverting water from a source alleged to be tributary to the stream from which plaintiff was entitled to a prior appropriation and where defendants denied that the source from which they diverted water was tributary to the stream from which plaintiff took water, the burden of proof was on plaintiff to show that it was a tributary and not on the defendant to show that it was not." *Buckers I. M. & Co. v. Platte Valley I. Co.*, 28 Colo. 187-188, 63 Pac. 305.

"If the court had adopted the proper theory (see above) as to where the burden of proof rested * * * perhaps the evidence is sufficient to sustain the findings. But as

it was conflicting on the subject, we are not able to say that the error of the trial court, in placing upon the appellants the burden it did, was not prejudicial; for with this burden placed upon appellee, it might have found that the preponderance of the evidence * * * was with appellants * * *. For this error the judgment must be reversed. * * *” Id. 191.

f. That volume not diminished by diversion from tributary.

The burden of proving that the volume of water is not diminished by diversion from a tributary, is upon the party so alleging. The degree of proof must be at least satisfactory. *Patterson v. Paine Water Com., et al.* 43 Colo. 184-186, 95 Pac. 301.

Sec. 182. Change of diversion.

See Change of Point of Diversion, Sec. 103.

a. May prove what is “likely” to occur.

Vogel v. Minn. Co., 47 Colo. 534, 539.

b. In general.

Proof of loss by seepage, evaporation, breadth and nature of the bottom of the stream may be given whether or not the bed of the stream is characterized by sand, gravel, rocks or vegetation.

Sec. 183. Data of water commissioner.

A water commissioner testified from a memorandum in a book written by himself, but from data furnished him by deputies. Held to be prejudicial error. *Big Thompson & P. R. D. Co. v. Mayne,* 36 Colo. 355-357, 91 Pac. 44.

Sec. 184. Declarations.

Declarations of the owner of a ditch may be received as evidence to show his intention to abandon or not to abandon.

Central Trust Co. v. Culver, 35 Colo. 93-96, 83 Pac. 1064; *Saint v. Guerrerio*, 17 Colo. 448-458, 30 Pac. 335; 145 U. S. 285; Greenleaf on Evidence (16th Ed.) 162a; *Boulder & W. R. D. Co. v. Leggett Cons. D. & R. Co.*, 36 Colo. 455-457, 91 Pac. 44; *Cache la Poudre Irr. Co. v. Larimer & Weld R. Co.*, 25 Colo. 144-150, 53 Pac. 318; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-364, 40 Pac. 989; *Butterfield v. O'Neill, et al.*, 19 Colo. App. 7-10, 72 Pac. 807.

Sec. 185. Easement—Parole grants.

See Easements, Sec. 163.

Syl. "Where the owner of land across which another had an easement in an irrigating ditch conveyed the land by deed containing the usual covenants without excepting therefrom the easement in an action by the owner of the easement against the purchaser of the land to enforce his right, the grantor was a competent witness on behalf of plaintiff to testify to a parole grant by him to plaintiff of the easement, and the evidence was not objectionable on the ground that it tended to nullify the deed * * *. Plaintiff not being a party to the deed, was not estopped by the recitals therein." *Croke v. The Am. Natl. Bank*, 18 Colo. App. 3, 70 Pac. 229; 2 *Devlin on Deeds, Secs. 820-821*; 2 *Wharton on Evidence, Secs. 1041-1042*.

Sec. 186. In actions relating to pro-rating of water.

See Pro-Rating, Sec. 152.

Sec. 187. Intention.

See Abandonment, Sec. 3a.

See Sec. 181c.

See Sec. 184.

Sec. 188. Objections to evidence—Main point in issue.

"Question—'From your experience as a farmer and in irrigation in connection with it, is there water enough in that

ditch now, or has there been for the last two years to irrigate the lands which have heretofore been irrigated by that ditch?" * * * The objection was well taken upon the ground (because the water embraced in the question was the question then at issue and on trial) and should have been sustained." *Combs v. Agr. D. Co.*, 17 Colo. 146-154, 28 Pac. 966.

Sec. 189. Objections to evidence in an equity case.

Objection to evidence, on trial to the court in an equity case, need not be interposed in order that it may be examined on appeal, if an exception is reserved to the judgment and properly preserved in the record. *Tubbs v. Roberts*, 40 Colo. 498-505, 92 Pac. 220.

Sec. 190. Of decree.

The judgment book is the best evidence of the amount of water decreed. *Bates v. Hall*, 44 Colo. 360-367, 98 Pac. 3

Sec. 191. Of written instruments—Oral—To contradict.

"Extrinsic evidence is not admissible either to contradict, add to, subtract from or vary the terms of a written instrument." *Nesmith v. Martin*, 32 Colo. 77-83, 75 Pac. 590; *Contra, See Croke v. American N. B.*, 18 Colo. App. 3-7, 70 Pac. 229.

Sec. 192. Of quantity of water flowing in a stream.

Evidence of the quantity of water flowing in a stream, should only be of the quantity flowing at the complaining party's headgate and not further up the stream. There may not be enough water to satisfy the appropriation at numerous points further up the stream, but the volume may be increased by return flow so as to be sufficient at the headgate of the complaining party. *Vogel v. Minn. Co.*, 47 Colo. 534-540, 107 Pac. 1108.

Sec. 193. Of title.

See Title, Sec. 290.

a. Possession and use prima facie.

"If respondents have no water rights to protect they are not in a position to interpose the objection that petitioner's proof in the respect noted is insufficient." *Bates v. Hall*, 44 Colo. 360-363, 98 Pac. 3.

b. Title to land not proof.

Evidence of title to land is not proof of right to water. *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846.

Sec. 194. Voluminous documents.**a. Oral.**

Syl. "In order to prove how much water had been contracted and sold by a certain water company, where the records of the companies contained copies of all the deeds and contracts issued by the companies were before the court and the deeds and contracts numbered about eight hundred * * * it was permissible for a witness who had examined the records of the company and computed from the deeds and contracts the amount of water sold, to testify orally as to the result of his examination (*Elliott's General Practice*, Vol. 1, Sec. 404; 20 *Wallace*, 125; 2 *Starkey*, 274; *Greenleaf* 14th Ed. Sec. 563h; 122 *Ind.* 554. And the witness, being familiar with the deeds and contracts issued by the companies, and being shown a sample of the contracts and deeds, might testify that all the contracts and deeds were of similar import." *New La Junta & L. C. Co. v. Kreybill*, 17 Colo. App. 26. 67 Pac. 1026.

Syl. "Where two water companies had issued about eight hundred contracts and deeds for water which have been recorded in the offices of the clerks and recorders of three counties * * * in order to prove the number of such instruments of record and the amount of water conveyed thereby,

it was not necessary to produce certified copies thereof, but a witness who had examined the records of the different counties for that purpose and counted the number of instruments on record and computed the amount of water conveyed thereby, could testify as to the result of his examination." Id. 26.

b. Best—Secondary.

"The rule requiring the best evidence is not inflexible, but yields in certain instances when the best evidence can not be produced without inconvenience." Id. 27.

CHAPTER XV.

FORFEITURE.

Of right to water—Non-payment of carriage charges § 195.

Of reservoir sites § 196.

By change of the head of ditch § 197.

See Canal Company, Sec. 93a.

Sec. 195. Of right to water—Non-payment of carriage charges.

The by-laws of a company may provide for a forfeiture of rights to water on account of non-payment of the price of carriage. *Cooper v. Shannon*, 36 Colo. 98-103, 85 Pac. 175.

Sec. 196. Of reservoir sites.

See Reservoirs, Sec. 263b, 253.

See Canal Co., Sec. 91a.

Sec. 197. By change of the head of ditch.

The change of the head of a ditch or the building of a new ditch does not effect a forfeiture of rights to water. *Greer v. Heiser*, 16 Colo. 307, 26 Pac. 770.

CHAPTER XVI.
INCREASED FLOW.

May be taken out of stream lower down § 198.

What is an increased flow § 199.

What is not an increased flow § 200.

Sec. 198. May be taken out of stream lower down.

If the natural flow of a stream be increased in volume by water—as that flowing from a tunnel which would not otherwise have reached the stream—such increase may be taken out of the stream at a point lower down provided there was no intention to abandon it. *Buckers I. M. & I. Co., et al., v. Farmers I. D. Co.*, 31 Colo. 62, 72 Pac. 49; *Ripley, et al. v. Park Center L. & W. Co.*, 40 Colo. 129, 90 Pac. 75.

See Appropriations, Secs. 45, 46, 51.

Sec. 199. What is an increased flow.

“It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel, to the benefit of other prior appropriators, which the law recognizes as an *increase* of that character which can be diverted as against those entitled to its natural flow.” *Buckers I. M. & I. Co., et al. v. Farmers’ Ind D. Co.*, 31 Colo. 62-70, 72 Pac. 49; *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77-82, 53 Pac. 334; *Farmers Union D. Co. v. Rio Grande C. Co., et al.*, 37 Colo. 512, 86 Pac. 1042.

Sec. 200. What is not an increased flow.

“The water which the defendants were diverting was derived solely from that which would naturally flow down the stream, and hence there was no increase.” *Buckers I. M. & I. Co., et al. v. Farmers Ind. I. D. Co.*, 31 Colo. 62-69, 72 Pac. 49.

CHAPTER XVII.

IRRIGATION DISTRICTS.

Admission of land into the district § 201.

Boundaries of the district to be determined by board § 202.

Confirmation of proceedings by court § 203.

Constitutionality of the act § 204.

(a) Title.

(b) In general—Upheld.

Division of district during pendency of adjudication § 205.

Exclusion of land from the district § 206.

Notice of forming of district § 207.

(a) Signed separately.

(b) To whom given.

Proof of ownership of land § 208.

(a) Abstract not proof.

(b) Affidavits not sufficient.

(c) Best evidence.

Sec. 201. Admission of land into the district.

See Sec. 206.

Sec. 202. Boundaries of the district to be determined by board.

The board can not surrender or delegate its duties as to determination of boundaries to others. *Ahern, et al. v. Board of Directors H. L. & I. Dist.*, 39 Colo. 409-423, 89 Pac. 963.

Sec. 203. Confirmation of proceedings by court.

"In this proceeding the district court must, for itself, and upon the evidence produced before it, wholly aside from the orders made and evidence heard by the two statutory boards, determine the validity or invalidity of the proceedings had before them." *Ahern, et al., v. Board of Directors H. L. & I. Dist.*, 39 Colo. 409-423, 89 Pac. 963.

Sec. 204. Constitutionality of the act.**a. Title.**

The title of the act is declared to be constitutional in *Anderson v. Grand Valley Dist.*, 35 Colo. 525-532, 85 Pac. 313.

b. In general—Upheld.

See *Anderson v. Grand Valley I. Dist.*, 35 Colo. 525, 85 Pac. 313; 76 Cal. 360, 18 Pac. 379; 79 Cal. 351, 21 Pac. 825; 88 Cal. 334, 26 Pac. 237; 92 Cal. 296, 28 Pac. 272, 675; 117 Cal. 382, 49 Pac. 354; 144 Cal. 329, 77 Pac. 937; 164 U. S. 112, 179; 185 U. S. 1; 4 Wash. 147, 29 Pac. 995; 29 Wash. 10, 69 Pac. 399; 45 Nebr. 411, 64 N. W. 1086.

Sec. 205. Division of district during pendency of adjudication.

Syl. "The division of an irrigation district by a legislative act without a saving clause, before the final adjudication of priorities therein, affects the subject matter of a pending proceeding to adjudicate priorities, and the district court of the proper county in the new irrigation district becomes vested with jurisdiction to determine the priorities in such new district." *Sterling I. Co., v. Downer*, 19 Colo. 595, 36 Pac. 787.

Sec. 206. Exclusion of land from the district.

Proof, that land excluded by the board should have been included, should be received. *Ahern et al. v. Board of Directors H. L. I. Dist.*, 39 Colo. 409-420-424, 89 Pac. 963; 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.

Sec. 207. Notice of forming of district.**a. Signed separately.**

The notice must be signed separately and independently of the petition. The petition and notice can not be combined and one signing suffice for both. *Ahern, et al., v. Board of Directors H. L. I. Dist.*, 39 Colo. 409-416, 89 Pac. 963.

b. To whom given.

The notice should not be directed to the board of county commissioners. It should be given to those not signing the petition. *Id.* 416.

Sec. 208. Proof of ownership of land.

a. Abstract not proof.

Abstract of title will not be proof that the signer of the petition is a land owner. *Id.* 420.

b. Affidavits not sufficient.

Affidavits of circulators of the petition that the signers were land owners will not suffice. *Id.* 420.

c. Best evidence.

Best evidence of ownership must be produced. *Id.* 420.

Transcripts or copies of the evidence adduced before the county commissioners are not admissible. *Id.* 421.

CHAPTER XVIII.
PLEADING AND PRACTICE.

Abandonment—Special plea § 209.

Adaptation of law to changed conditions § 210.

Arizona and New Mexico dissimilar to Colorado § 211.

Adjudication—Allegation of—Prima facie § 212.

Allegations—Legal conclusions § 213.

(a) When appropriation is not in issue.

Amount of water in adjudication § 214.

Collateral attack § 215.

Criminal law—Contempt § 216.

Criminal law—Information § 217.

Cross bill § 218.

Enlarged use § 219.

Evidence—None—Dismissal § 220.

Judgment—Conclusiveness—Condemnation § 221.

Equity § 222.

(a) Jurisdiction—Easements.

(b) Jury—Advisory.

(c) Sufficiency of pleading.

(d) Relief to one not a party to an adjudication.

Estoppel § 223.

(a) Acquiescence.

(b) As to sale of excess rights.

(c) By conduct or contract.

(d) By receiving water under a decree.

(e) Corporation—Assessments on stock.

(f) Evidence of estoppel.

(g) Pleading estoppel.

(h) What necessary to establish.

Fraud—Setting aside decree therefor § 224.

Injunction § 225.

(a) Complaint.

(b) Defense—Action by senior against junior appropriator.

(c) For interference with water right.

Intervention § 226.

(a) Questions raised.

(b) Sufficiency of pleading.

(c) Who may intervene

(d) When not necessary to intervene.

Judge—Disqualified to try cause § 227.

Judicial notice § 228.

Jurisdiction § 229.

(a) Acquiescence.

(b) Appropriation in Colorado for use in New Mexico.

(c) Effect of judgment without jurisdiction of person—Meritorious defense.

(d) Of district court.

(e) Of part of district.

Laches § 230.

Lapse of time § 231.

Mandamus § 232.

(a) Affidavit.

(b) Alternative writ of.

(c) Commanding that to be done which is impossible to perform.

Objection to judgment—Trial to court § 233.

Parties § 234.

(a) Canal company.

(b) Consumers—In adjudication.

(c) Defect of parties.

(d) Grantors.

(e) In injunction.

(f) Sale of excess rights.

(g) Loaning water.

(h) Necessary—In action relating to excess rights.

(i) State officers.

(j) To Adjudication.

Prescriptive right § 235.

Replication—Alding complaint § 236.

Prejudicial error—Presumption on appeal § 237.

Variance—When not fatal § 238..

Receivers—Indebtedness created by § 239.

Setting aside a decree—Stranger to action § 240.

Venue—Change § 241.

Wyoming § 242.

See Canal Companies, 93a.

See Change of Point of Diversion, 106b.

See Damages, Sec. 135.

See Quieting Title, Sec. 247.

See Review and Rehearing, Sec. 273.

See Evidence.

See Prescriptive Right, Sec. 243.

Sec. 209. Abandonment—Special plea.

See Abandonment.

When abandonment is pleaded as a defense, it comes within the general definition of new matter and must be specially pleaded. *Hector M. Co. v. Valley M. Co.*, 28 Colo. 315-317, 64 Pac. 184.

Sec. 210. Adaptation of law to changed conditions.

"It would be unfortunate, indeed, if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits." *Seven Lakes R. Co., v. New Loveland & G. I. & L. Co.*, 40 Colo. 382-386, 93 Pac. 485.

Sec. 211. Arizona and New Mexico dissimilar to Colorado.

The statutes and customs of those states are so dissimilar to those of Colorado that the decisions in those states are of little value in Colorado. *Fort Lyon C. Co., v. Chew, et al.*, 33 Colo. 392-403, 81 Pac. 37.

Sec. 212. Adjudication—Allegation of—Prima facie.

The allegation of an adjudication presents a *prima facie* case. *Medano D. Co., v. Adams, Trustee*, 29 Colo. 317-328, 68 Pac. 431.

Sec. 213. Allegations—Legal conclusions.

Syl. "A complaint which merely alleges a priority of appropriation of the water of a natural stream, without alleging facts showing such prior appropriation, states a conclusion of law, only, and is upon demurrer fatally defective." *Farmers' H. L. C. & R. Co. v. Southworth*, 13 Colo. 112, 21 Pac. 1028.

a. When appropriation is not an issue.

"The question of priority is not involved in the case at bar. Its purpose was to restrain the defendants from diverting water belonging to or under the control of, the plaintiff,

from the canal through which it was being conducted to its stockholders. The important ultimate question presented was, did the defendants have any right to this water? No question of priority of appropriation as between the parties was involved, and hence the strict rule regarding pleading a priority of appropriation will not be enforced." *Hackett v. Larimer & Weld Co.*, 48 Colo. 178-183, 109 Pac. 965.

Sec. 214. Amount of water in adjudication.

Syl. "A complaint which alleges a contract for the use of water from a ditch sufficient to irrigate 160 acres of land is sufficiently definite as to the amount of water, to state a cause of action." *McClure v. Keon*, 25 Colo. 284, 53 Pac. 1058.

Sec. 215. Collateral attack.

"To now deprive them of these rights (water rights) would despoil them of the benefit of their expenditures and years of labor. To impose upon them, in case of a collateral attack, the burden of showing affirmatively that all steps had been taken to authorize the court to render the decree relied upon would, in many instances, work this result. While it is true that under the doctrine of some jurisdictions, the district courts of this state, in adjudicating water rights under the statute, would be held courts of limited jurisdiction, we prefer to adopt the rule, supported by abundant authority, that our district courts in such proceedings are courts of general jurisdiction, and thus protect the claimants of adjudicated water rights from the possibility of losing the fruits of their toil by the neglect or inadvertance of persons for which they are not responsible." *Farmers Union D. Co., v. Rio Grande C. Co., et al.*, 37 Colo. 512-520, 86 Pac. 1042.

The publication and posting of notice of adjudication as required by statute is presumed, and the decree can not be attacked collaterally on the ground that such notice has not been given. *Farmers' Union D. Co., v. Rio Grande C. Co., et al.*, 37 Colo. 512-519, 86 Pac. 1042; *Van Wagenen v. Car-*

penter, 27 Colo. 444, 61 Pac. 698; *Burris v. Craig*, 34 Colo. 383, 82 Pac. 944.

See 17 *A. & E. Encyl. of Law* (2nd Ed.) Sec. 1080-1081.

Sec. 216. Criminal law—Contempt.

Proceedings for contempt will not lie against one interfering with a water commissioner in closing a headgate, *Roberson v. People, ex rel. Soule, Water Com.*, 40 Colo. 119, 90 Pac. 79.

Sec. 217. Criminal law—Information.

"The information should show that the applicant for the water is of the class of persons entitled to invoke the protection of the statute; that is, to demand of the ditch owner and receive from him the water upon compliance by him with the terms of the statute. * * * The pleading should designate the land for which the water was demanded as being so situated that the duty of the ditch to furnish water for its irrigation is made to appear and that the company might ascertain its location so as to deliver the water." *Schneider v. The People*, 30 Colo. 493-499, 71 Pac. 369.

Sec. 218. Cross bill.

"The subject-matter of the cross-bill is not foreign to the subject of the original bill; it is the same subject-matter, but the cross-bill goes further, and like the answer, states additional facts relating to the controversy, for the purpose of justifying the conduct of the appellee, and to show a right to affirmative relief against the acts of appellant. This is not only admissible, but in most if not all cases, absolutely necessary to be done in drafting a cross-bill." *Crisman v. Heiderer*, 5 Colo. 593.

Sec. 219. Enlarged use.

See Sec. 70c.

Sec. 220. Evidence—None—Dismissal.

"Since no evidence was heard or offered by any of the parties, and as the first defense of the answer is a general denial of the material averments of the complaint, the judgment dismissing the action might be affirmed on that ground alone." *Combs, et al., v. Farmers' H. L. C. & I. Co.*, 38 Colo. 420-423, 88 Pac. 396.

Sec. 221. Judgment—Conclusiveness—Condemnation.

See Damages, Sec. 136.

Sec. 222. Equity.**a. Jurisdiction—Easements.**

"It is further insisted that this is not a case of equitable cognizance. As seen * * * the action was brought to protect plaintiff in its enjoyment of an easement; such a proceeding is peculiarly within the jurisdiction of equity. *Pomeroy's Equity Jurisprudence, Vol. 3 Sec. 1351; Fuller v. Swan River Placer M. Co.*, 12 Colo. 12, 19 Pac. 836." *Croke v. The Am. Natl. Bank*, 18 Colo. App., 3-7, 70 Pac. 229.

b. Jury—Advisory.

"In an equity case, where the issues are submitted to a jury their verdict is merely advisory to the court, and may be disregarded. * * * 26 Colo. 39, 56 Pac. 573. The court may adopt such findings in whole or in part, and in lieu of those not adopted, make findings of its own." *Buckers I. M. & I. Co., et al. v. Farmers' I. D. Co.*, 31 Colo. 62-69, 72 Pac. 49.

c. Sufficiency of pleading.

"Upon reason and principle it would seem, therefore, that what the statute (in re adjudication procedure) regards and expressly requires as material facts to be alleged and shown in order to sustain a statutory decree, should be none the less essential to uphold a decree in a suit in equity intended to accomplish the same purpose, conceding that this form of

action may be maintained." *Church v. Stillwell*, 12 Colo. App. 43-47, 54 Pac. 395.

d. Relief to one not a party to an adjudication.

"If such relief can, in any event, be granted to one not a party to the original proceeding, the available remedy is a suit in equity and not a proceeding under the statute." *Broad Run Co. v. Deuel & Snyder Co.*, 47 Colo. 573-577, 108 Pac. 755.

The "relief" meant is that sought by one not a party to the adjudication proceeding and after four years has elapsed.

Sec. 223. Estoppel.

a. Acquiescence.

"It is further alleged that ever since the date of the decree (1884) * * * the defendant has in each and every year exercised its right to have the water turned into its ditch by the water commissioner to the extent of the appropriation awarded it, and that the water commissioner has recognized, during all such time, a seniority of the defendant's appropriation over that of the plaintiff, and that plaintiff, and its grantor, during all of such time, well knew that the defendant and its grantor claimed, took and used the water by virtue of its said priority; and notwithstanding the same, the plaintiff and its grantor were silent with respect thereto, and made no complaint, objection or protest to the defendant or to the water commissioner until about the time of the beginning of this action in August, 1893." *Water S. & S. Co., v. Tenney, et al.* 24 Colo. 344-346, 51 Pac. 505.

"We are satisfied that it (allegations of estoppel and evidence) is not sufficient to work a forfeiture of the superior rights which the decree conferred upon the ditch owned by the plaintiff company. * * * in shutting down the head-gates of these two ditches at different times the water commissioner frequently did it so nearly simultaneously and with so little apparent discrimination in favor of one against

the other that this, of itself, should not operate to divest the plaintiff of valuable property rights. * * * In conversation with the water commissioner, the officers of the plaintiff company denied the correctness of the assumption by him, and asserted that their ditch was entitled to precedence, * * * within a reasonable time after it became apparent that the defendant company intended to insist upon its construction of this decree the plaintiff company began this suit * * * . 2, *Pomeroy's Eq. Jur. (2nd Ed.) Sec. 817.*" *Id.* 353-354.

The conduct of one in standing by while other parties expended money in the acquisition of valuable rights, upon the strength of a decree, equitably estops them from afterwards assailing its validity. *Id.* 548.

b. As to sale of excess rights.

See Conveyance, Sec. 130.

"While the doctrine of estoppel * * * may be applicable to the companies selling these excess water rights, it is in no sense applicable to the plaintiff (the new company organized by consumers under the original contract) for the obvious reason that no such relationship exists between it and the company selling the water rights as to estop it, because the vendors of those whom it represents may be estopped." *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-233, 73 Pac. 249.

As to Pleading and Practice, See Sec. 233b.

c. By conduct or contract.

One may be estopped by conduct or contract from denying the rights of another, although such other party could not claim or establish a prescriptive right. *Tew v. Powar*, 37 Colo. 292, 86 Pac. 342.

See Res Adjudicata.

d. By receiving water under a decree.

One who has received water under an adjudication decree is estopped from attacking the decree. *Kerr v. Burns*, 42 Colo. 285-290, 93 Pac. 1120. Even if the decree were void, if a

party has received benefit under it, he is estopped. *Denver C. I. & W. Co. v. Middaugh*, 12 Colo. 434-436; *Arthur v. Israel*, 15 Colo. 147-152; *Handy D. Co. v. South Side D. Co., et al.*, 26 Colo. 333-336, 58 Pac. 30.

e. Corporation—Assessments on stock.

Syl. "A corporation having sold the stock of a shareholder for a delinquent assessment, and bought in the stock itself with his acquiescence, is estopped to charge him with further assessments." *Patterson v. Brown, etc., D. Co.*, 3 Colo. App. 511, 34 Pac. 769.

f. Evidence of estoppel.

See Conveyance, Sec. 127a.

g. Pleading estoppel.

Syl. "In an action to determine the priority to the use of water, a complaint that alleges that defendants for a * * * number of years subsequent to * * * decrees * * * permitted plaintiff's reservoir to be first filled without protest, and that plaintiff relying on such acts as a construction of the decree expended large sums of money in improvements * * * and that the water commissioners had recognized the rights of plaintiff as paramount to those of defendants, but fails to allege that during this time the supply of water subject to the use of the parties was insufficient to fill all the reservoirs both of the plaintiff's and defendant's does not state a cause of action against defendants by estoppel to claim a priority over plaintiff's reservoir." *Church v. Stillwell*, 12 Colo. App. 43-44, 54 Pac. 395.

h. What necessary to establish.

"Before the conduct of one party will create an estoppel in favor of another with respect to the title of the subject-matter of dispute between them, it must appear that the party against whom such estoppel is sought to be established was apprised of the true state of his own title; that by such conduct he intended to deceive or thereby was guilty of such negli-

gence as to amount to a fraud; that the other was not only destitute of all knowledge regarding the true state of his title, but of the means of acquiring such knowledge. There must be some degree of turpitude in the conduct of the party before a court of equity will estop him from the assertion of his title, when the effect of the estoppel is to forfeit his property and transfer its enjoyment to another. 14 Cal. 279; 1 *Story's Eq. Jur.*, Sec. 391; 2 *Pomeroy's Eq. Jur.*, Secs. 807, 817; 24 Colo. 344, 51 Pac. 505." *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267-274, 60 Pac. 629.

Sec. 224. Fraud—Setting aside decree therefor.

See Adjudication, Sec. 16i.

"To hold that a decree obtained by fraud could not be attacked and set aside, provided the party perpetrating the fraud could succeed in concealing his fraudulent conduct for the period of four years, would be to furnish unprincipled people with a sword to be wielded in the destruction of the property rights of others, and offer a premium to knavery." *Ditch Co. v. Ditch Co.*, 19 Colo. 222-224, 34 Pac. 988.

Sec. 225. Injunction.

See Parties, 234e.

a. Complaint.

For complaint and answer in an application for an injunction by a ditch company against a consumer claiming water under a contract for more water than needed, see *White v. High Lince C. Co.*, 22 Colo. 191, 43 Pac. 1028.

"A complaint against a ditch company by the owner of a water right therein which alleges its failure to deliver the water, that plaintiff's growing crops would be lost unless water was furnished, but which contained no allegation of insolvency of the corporation, shows on its face that the remedies at law were adequate, and fails to confer jurisdiction in equity." *Fulton D. Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. 253.

The complaint must allege facts and not merely conclu-

sions of law. *Carroll v. Vance, et al.*, 39 Colo. 216-217, 88 Pac. 1069.

b. Defense —Action by senior against junior appropriator.

"In an action by a prior appropriator against subsequent appropriators above him on the same stream, to compel them to permit water to flow by their headgates sufficient to supply his appropriation, it is no defense that other parties with appropriations junior to those of defendants are diverting water which, if permitted to flow down the stream, would supply plaintiff's appropriation.

A prior appropriator may bring an action against any or all junior appropriators to enforce his rights, leaving them to settle their priorities amongst themselves." *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267-268, 60 Pac. 629.

c. For interference with water right.

"That a court of equity, independent of the statute, has jurisdiction to restrain interference with a water right, seems well settled." *Gutheil R. I. Co. v. Montclair*, 32 Colo. 420-424, 76 Pac. 1050.

Sec. 226. Intervention.

a. Questions raised.

A question of fact, not involved in the pleadings of the original parties, may be raised by the intervenor and not change the issue. *Cache la Poudre I. D. Co. v. Hawley, et al.*, 43 Colo. 32-39, 95 Pac. 317.

b. Sufficiency of pleading.

"In determining the sufficiency of a petition to intervene, the averments of the petition, so far as well pleaded, must be taken as true." *Id.* 38; *Heney v. Travelers Ins. Co.*, 16 Colo. 179, 26 Pac. 318; *Wood v. Water Works Co.*, 20 Colo. 253, 38 Pac. 239; *Morcey v. Lett*, 18 Colo. 128, 31 Pac. 857.

c. Who may intervene.

Any one who will gain or lose by the legal operation and

effect of the judgment is entitled to intervene. *Cache la Poudre I. D. Co. v. Hawley, et al.*, 43 Colo. 32-38, 95 Pac. 317.

d. When not necessary to intervene.

"The plaintiff company was not a party to this suit, nor was it under any obligation to intervene, although it may have had knowledge of its pendency." *Hackett v. Larimer & Weld Co.*, 48 Colo. 178-187, 109 Pac. 965.

Sec. 227. Judge—Disqualified to try cause.

If parties do not object to a judge trying a case, on the grounds that he had been an attorney for one of the parties, they will be held to have acquiesced on appeal. *Kerr v. Burns*, 42 Colo. 285-291, 93 Pac. 1120.

Sec. 228. Judicial notice.

"This court takes judicial cognizance of these irrigation statutes." *Combs, et al. v. Farmers H. L. C. & R. Co.*, 38 Colo. 420-432, 88 Pac. 396.

Sec. 229. Jurisdiction.

a. Acquiescence.

"The second defense of the answer averred that the district court of Boulder County, in which the decree relied upon by the plaintiff was rendered, was without jurisdiction, since before the institution of proceedings therein, the district court of Larimer county entered an order appointing a referee to take testimony concerning the adjudication of water rights in that district; and that by the entry of that order, and the commencement of proceedings therein, the district court of Larimer county acquired exclusive jurisdiction of such adjudication * * * . * * * No objection was made by any one to the jurisdiction of the district court of Boulder county at the time the proceedings were therein pending; and for several years thereafter defendant acquiesced in the decree and enjoyed

its benefits. It can not therefore be heard in this action to say that the decree of the district court of Boulder county is not binding upon it. * * * 22 Colo. 115, 43 Pac. 540." *Con. Home S. D. & R. Co. v. New Loveland & G. I. & L. Co.*, 27 Colo. 521-522-523, 62 Pac. 364; *Handy D. Co. v. South Side D. Co., et al.*, 26 Colo. 333, 58 Pac. 30.

b. Appropriation in Colorado for use in New Mexico.

Syl. "The courts of this state have no jurisdiction to award priorities to the use of water to a ditch intended to water lands outside the state, although the ditch has its head-gate within the state." *Lamson, et al., v. Vailes, et al.*, 27 Colo. 201, 61 Pac. 231. See *Willey et al. v. Decker*, 11 *Wyo.* 496, 73 Pac. 210.

**c. Effect of judgment without jurisdiction of person—
Meritorious defense.**

"A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or in an answer to an action seeking to enforce the judgment where equitable defenses are allowable, as in this state, although in the complaint there is no allegation of merits." *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-460, 76 Pac. 794; *G. W. M. Co. v. W. of A. M. Co.*, 12 Colo. 46, 60; *Du Bois v. Clark*, 12 Colo. App. 220-233, 55 Pac. 750.

d. Of district court.

The statute designating exclusive jurisdiction in the district court does not "enlarge or limit the constitutional jurisdiction of the district court in this respect." *Kerr v. Burns*, 42 Colo. 285-289, 93 Pac. 1120.

e. Of part of district.

See Adjudication, Sec. 27.

See Canal Company, Sec. 101.

Sec. 230. Laches.

Institution of suit will not necessarily relieve from charge of.

The mere institution of a suit does not of itself relieve a person from a charge of laches, and if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun. *Hagerman v. Bates*, 24 Colo. 71, 49 Pac. 139.

Sec. 231. Lapse of time.

See Abandonment.

Sec. 232. Mandamus.**a. Affidavit.**

Syl. "The petition and affidavit for mandamus need not necessarily be separate papers." *Golden C. Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

The petition if verified fills the requirement of an affidavit. *Id.* 144.

b. Alternative writ of.

"It must state a cause of action * * *. Its legal sufficiency may, by the return or answer provided for in the Civil Code, be challenged as upon demurrer and tested under the rules of pleading applicable to the ordinary complaint, when assailed by demurrer." *Wheeler v. Northern C. I. Co.*, 10 Colo. 582-586, 17 Pac. 487; *People v. Farmers' H. L. C. Co.*, 25 Colo. 202-203, 54 Pac. 626.

c. Commanding that to be done which is impossible to perform.

In 42 Colo. 267, 93 Pac. 1125, it was held that, where a mandamus was granted by the trial court for the delivery of water in 1903, and in 1904 an appeal was taken, that the cause should be dismissed on account of commanding that to be done which was impossible to perform.

Sec. 233. Objection to judgment—Trial to court.

"In an equitable action, tried to the court, when an exception is reserved to the judgment and properly preserved in the record, the evidence as a whole may be examined (on appeal) for the purpose of ascertaining if it will sustain the judgment, even though no objection was interposed to its reception.—*Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570; *Phelps v. Spruance*, 1 Colo. 414; *Breen v. Richardson, et al.*, 6 Colo. 605;" *Tubbs v. Roberts*, 40 Colo. 498-505, 92 Pac. 220.

Sec. 234. Parties.

See Res Adjudicata, Sec. 268.

See Quieting Title, Sec. 249.

a. Canal company.

"A ditch company may itself maintain an action to protect the rights of its stockholders and consumers of water under its ditch." *Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. 532; *Independent D. Co. v. Ag. D. Co.*, 22 Colo. 513, 45 Pac. 444; *Sterling v. Pawnee D. E. Co.*, 42 Colo. 421, 431, 94 Pac. 339.

b. Consumers—In adjudication.

The consumers of water need not be made parties to an adjudication proceeding.

"Courts will never sanction a practice which imposes an impossible or even an unreasonable requirement upon litigants." *Ind. D. Co. v. Ag. D. Co.*, 22 Colo. 513-524, 45 Pac. 444.

c. Defect of parties.

A defect of parties, as contemplated by Code Sec. 31, must be construed as meaning those parties without whom no decree could be rendered. *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-226, 73 Pac. 249.

d. Grantors.

A party is bound by an adjudication if his grantor was a party to the proceedings.

e. In injunction.

Syl. "Where a canal company sold water rights * * * and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operating the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system." *New La Junta & L. C. Co. v. Kreybill*, 17 Colo. App. 26-27, 67 Pac. 1026.

"If plaintiff had, by 'priority of appropriation,' actually acquired 'the better right' to the use of the water of a natural stream than either or all of the several defendants, he was entitled to have such priority protected against their acts, whether joint or several, and for that purpose was entitled, if necessary, to join them all as defendants in one action * * *. He may bring and maintain an action jointly against all parties, junior in right to himself, whenever the result of their acts, either joint or several, deprives him of his better right to the use of the water, or substantially interferes therewith." *Saint v. Guerrerio*, 17 Colo. 448, 454, 29 Pac. 746.

f. Sale of excess rights.

See Canal Company, Sec. 93b, 100.

All parties to whom excess rights have been sold need not be made parties to a suit to cancel such excess rights. "Merely because rights have not been cancelled which have no better

standing than those of appellants is not a matter of which they can complain, for it in no manner prejudices their rights." *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-244, 73 Pac. 249.

See Distribution, Sec. 152c.

g. Loaning water.

See State Officers, Sec. 280c.

h. Necessary—In action relating to excess rights.

In an action to set aside conveyances of excess rights of water in a canal, the company making the sale or contract is not a necessary party. *Blakely v. Ft. Lyon C. Co.*, 31 Colo. 224-236, 73 Pac. 249.

"The answer set up that there are water-right owners, other than the respondents brought in, who are interested in the pending proceedings adversely to petitioner, but their names are not given or their interests designated. This is not a good defense as it is pleaded. * * * " *Waterman v. Hughes, et al.*, 33 Colo. 270-279, 80 Pac. 891; *Farmers' Ind. D. Co. v. Ag. D. Co.*, 3 Colo. App. 255, 32 Pac. 722.

i. State officers.

See State officers, Sec. 279. See 234i.

"Their answer to the complaint may be disregarded, as it merely sets forth the statutory authority under which they are acting, and the validity of their acts depends upon the rights of their co-defendant company." *Combs, et al. v. Farmers' H. L. C. & I. Co.*, 38 Colo. 420-422, 88 Pac. 396; *Ind. D. Co. v. Ag. D. Co.*, 22 Colo. 513-514, 45 Pac. 444.

j. To adjudication.

Who are parties—"One is a party to these proceedings who has due notice thereof, or who appears therein, or files his statement of claim." *Crippen, Trustee, v. The Y. X. I. D. Co.*, 32 Colo. 447-455, 76 Pac. 794.

See Review and Rehearing, Sec. 273.

Sec. 235. Prescriptive right.

Syl. "Plea of a prescriptive right to divert and take the waters of a reservoir, while being afterwards carried through the canal, must show the taking and enjoyment of the waters of the reservoir. An averment that the defendants have for a long series of years, 'diverted water from the canal without let or hinderance, etc.,' not averring that the water so diverted was water from the reservoir, is insufficient." *Hackett v. Larimer & Weld Co.*, 48 Colo. 179, 109 Pac. 965.

Sec. 236. Replication—Aiding complaint.

Syl. "A defective complaint may be aided, and omissions supplied by the answer, or by allegations in the replication if acquiesced in." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 25 Colo. 87, 53 Pac. 386.

Sec. 237. Prejudicial error—Presumption on appeal.

See Appeal, Sec. 38.

Sec. 238. Variance—When not fatal.

"A variance which neither surprises nor harms a party is not necessarily fatal to the judgment." *Doland v. Grand Valley I. Co.*, 28 Colo. 150-154, 65 Pac. 300; *C. F. & I. Co. v. Cummings*, 8 Colo. App. 541, 46 Pac. 875; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058; *Schmidt v. Bank*, 10 Colo. App. 261, 50 Pac. 733.

a. Amendment.

"By strict practice the defendant might have been required to amend its defense to correspond to the proof, but under the liberal provision of our code, the judgment will not be reversed for its omission to make that request, or for its failure so to amend its pleading, when it is apparent that substantial justice has been done." *Doland v. Grand Valley I. Co.*, 28 Colo. 150-154, 63 Pac. 300.

Sec. 239. Receivers—Indebtedness created by.

"The receiver's indebtedness had to be cared for, and the court had the inherent power to place itself in a position which would enable it to make and enforce orders with respect to such indebtedness." *La Junta & L. C. Co. v. Hess, et al.*, 31 Colo. 1-11, 71 Pac. 415.

Sec. 240. Setting aside a decree—Stranger to action.

A stranger may move to set aside a decree if he is injuriously affected thereby. *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447, 76 Pac 794.

Sec. 241. Venue—Change.

The judge having been attorney for one of the parties. See *Kerr v. Burns, et al.*, 42 Colo. 285-292, 93 Pac. 1120.

Sec. 242. Wyoming.

Statutes and proceedings compared with those in Colorado. *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-456, 76 Pac. 794.

CHAPTER XIX.
PRESCRIPTIVE RIGHT.

Water from reservoir § 243.

Adverse user—Color of title § 244.

Paper title required § 245.

See Easement, Sec. 170.

Sec. 243. Water from reservoir.

"No facts were alleged from which it would appear that by the lapse of time the defendants had acquired any prescriptive right to the use of reservoir water, for the reason that it nowhere appears that they had diverted water belonging to the reservoir company. True, they say they have diverted water from the canal without let or hinderance on the part of the plaintiff company, but they do not charge that the water so diverted was the water of that company." *Hackett v. Larimer & Weld Co.*, 48 Colo. 178-186, 109 Pac. 965.

Sec. 244. Adverse user—Color of title.

To establish an adverse use, the claim must be based on "color of title," which is a paper title. *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267-276, 60 Pac. 629.

See Abandonment, Sec. 3b, 3.

Sec. 245. Paper title required.

"The evidence fails to disclose that. . . . have a paper title such as the statute requires upon which to base their claim to the use of the water. * * *" *Clark, et al. v. Ashley, et al.*, 34 Colo. 285-289, 82 Pac. 588; *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267, 60 Pac. 629.

CHAPTER XX.

QUIETING TITLE.

Change of point of diversion § 246.

Complaint in action for § 247.

Jurisdiction—Equity § 248.

Parties to action § 249.

(a) State officers.

(b) Administrator.

To a parole gift § 250.

To a perpetual water right § 251.

To a water right § 252.

See Adjudication, Sec. 24b.

Sec. 246. Change of point of diversion.

“Change of point of diversion can not be raised in an action to quiet title.” *Fluke, et al. v. Ford*, 35 Colo. 112-116, 84 Pac. 469.

Sec. 247. Complaint in action for.

“Complaint may properly allege general ownership and possession and call upon the defendant to set up any adverse interest he may have or claim—Chapter 22 of the Code.” *Kimball v. Northern Colo. I. Co.*, 42 Colo. 412-421-429, 94 Pac. 333.

A complaint in an action to quiet title to a water right may have some of the characteristics of a bill to quiet title and also some of the features of a suit to prevent a disturbance or obstruction of a right to use water for irrigation. *Gutheil P. I. Co. v. Montclair*, 32 Colo. 420-422, 76 Pac. 1050.

Sec. 248. Jurisdiction—Equity.

“That a court of equity, independent of statute, has jurisdiction to restrain interference with a water right, seems

well settled." *Gutheil P. I. Co. v. Montclair*, 32 Colo. 420-425, 76 Pac. 1050.

"The court having acquired jurisdiction to restrain interference with plaintiff's use of water, might properly retain jurisdiction and determine all the rights of the parties, even though plaintiff is not in actual possession." *Id.* 425.

Sec. 249. Parties to action.

"An action to quiet title * * * does not lie at the instance of an administrator." *Travelers I. Co. v. Childs, Admr.*, 25 Colo. 360-363, 54 Pac. 1020.

Sec. 250. To a parole gift.

Syl. "In an action to quiet title, a complaint which alleges that after plaintiff became of age he rendered services for his father, one of the defendants, in consideration of which his father made him a parole gift of the premises in suit, which plaintiff accepted in liquidation of his claim, and relying on said parole gift, and with the knowledge and consent of the defendants, plaintiff went into possession of said premises and erected thereon permanent and valuable improvements and thereafter remained in possession, alleges a sufficiently definite contract and is sufficient to support the action." *Brothers v. Brothers*, 29 Colo. 69, 66 Pac. 901.

Sec. 251. To a perpetual water right.

"While, in some of the deeds offered in evidence the description of the water right conveyed is rather indefinite; if considered in connection with the testimony offered, the admissions of the appellant, and the allegations of the complaint not denied, the description is made certain." *Grand Valley I. Co. v. Leshner*, 28 Colo. 273-288, 65 Pac. 44.

Sec. 252. To a water right.

An action to quiet title to a water right will lie. *Kimball, et al. v. Northern C. I. Co.*, 42 Colo. 412-413, 94 Pac.

333; *Grand Valley I. Co. v. Lesher, et al.*, 28 Colo. 273, 65 Pac. 44; *Gutheil P. I. Co. v. Montclair*, 32 Colo. 420-437, 76 Pac. 1050; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175.

CHAPTER XXI.

RESERVOIRS.

- Appropriation for § 253.
 - Built by state § 254.
 - Change of place of storage § 255.
 - Conditional decree § 256.
 - Liability for damages § 257.
 - Date of priority § 258.
 - Distinguished from water for immediate irrigation § 259.
 - One filling only § 260.
 - Use of returned water for reservoir § 261.
 - When water may be stored § 262.
 - Reservoir sites § 263.
 - (a) Filing map.
 - (b) Forfeiture.
 - Undeveloped reservoirs § 264.
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Sec. 253. Appropriation for.

Priorities of appropriation of water, for reservoirs, to be stored during the non-irrigating season, date from the time of the beginning of the work on the reservoirs if completed within a reasonable time and applied to a beneficial use. The priority may date from the time of beginning of work on the feeder, if the whole work is completed within a reasonable time, but the priority of appropriation of water through a ditch for immediate irrigation can not be claimed as a priority for storage purposes, even though the ditch, with an early priority, be used as a feeder for the reservoir, when the reservoir was constructed long after the ditch. Mere intention to construct a reservoir will not suffice. "That intention must be manifested by a completion of the different parts of the general plan, and a beneficial use within a reasonable time. *Irr. & Land Co. v. Ditch & Res. Co.*, 27 Colo. 525, 529.

a. Intention.

See Appropriation, Sec. 75.

"Mere intention of an appropriator to build a reservoir and make it a part of a general system of appropriating water, is of itself insufficient to constitute a vested right to store water therein." *New Loveland & G. I. & L. Co., v. Con. Home S. D. & R. Co.*, 27 C. 525-529, 62 Pac. 366.

"If, by neglect to apply the water within the proper time, the right to apply was forfeited, the water reverted, and any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the reentry and prosecution of the enterprise by the first party. * * * *

The first party may resume * * * * if such resumption occurs before intervening rights attach * * * * "

Beaver Brook R. Co. v. St. Vrain R. Co., 6 Colo. App. 130-135, 40 Pac. 1066.

Sec. 254. Built by state.

"We have no hesitation in saying that public reservoirs for the storage of water for irrigation and domestic uses are internal improvements (contemplated by act of Congress of March 3rd, 1875, in re five per cent. from the proceeds of public lands) and that the general assembly may lawfully make appropriation from such fund for such purposes." *Internal Imp. Fund*, 12 Colo. 288, 21 Pac. 483.

Sec. 255. Change of place of storage.

See Secs. 145, 68, 67.

"The change of place of storage or use from one reservoir to another, if not identical in principle is analogous to a change of place of use of irrigating water from one tract of land to another." *Windsor R. & C. Co. v. Lake S. D. Co.*, 44 Colo. 214-222, 98 Pac. 729.

(a) From irrigation to storage.

Can not use water for storage which has been appropriated for immediate irrigation. *Cache la Poudre I. D. Co. v. Hawley, et al.*, 43 Colo. 32-42, 95 Pac. 317.

Sec. 256. Conditional decree.

"It was not within the jurisdiction of the court in the proceedings leading up to the decree to make an absolute and unconditional decree of priority for a reservoir not then begun or constructed." *New Loveland & G. I. & L. Co. v. Con. Home S. D. R. Co.*, 27 Colo. 525-529, 62 Pac. 366.

Sec. 257. Liability for damages.

See Damages.

Syl. "The owner of a reservoir is liable for injuries occasioned to others by leakage or overflow therefrom, or the breaking of the embankment. No skill, care, or diligence, in construction or maintenance relieves him. The natural hill-side or mesa, against which the embankment is constructed, and which aids in impounding the water, is part of the reservoir within the statute. The owner is liable for injuries occasioned by its giving way, though the artificial embankment remain." *Garnet Co. v. Sampson*, 48 Colo. 285, 110 Pac. 79. *Napier v. Glenwood L. & W. Co.*, 49 Colo. 208.

Sec. 258. Date of priority.

"The date of the priority of right for storage purposes attaches at the time when the actual work of construction of the reservoir is begun, provided, of course, such work is prosecuted to completion with reasonable diligence, and beneficial use made of the water within a reasonable time; and is not necessarily fixed by the time of the beginning of work upon the feeder of the reservoir, unless indeed it can be said that the two are so closely connected in point of time, in original intention and actual construction that they may fairly be considered as a part of the same general and continuous enter-

prise; and this depends upon the facts of each case." *New Loveland G. I. & L. Co. v. Con. Home S. D. & R. Co.*, 27 Colo 525-528, 62 Pac. 366; *Colo. M. & E. Co. v. Larimer & Weld I. Co.*, 26 Colo. 47, 56 Pac. 185, 81 Fed. 73; *Kinney on Irrigation*, Secs. 230-232; 34 Cal. 109.

Sec. 259. Distinguished from water for immediate irrigation.

"The right of storing water in reservoirs is one thing and the right of diverting water for immediate use in irrigating lands is another and distinct thing, and neither necessarily depends upon or is connected with the other." *New Loveland & G. I. & L. Co. v. Con. Home S. D. & R. Co.*, 27 Colo 525-528, 62 Pac. 366.

Sec. 260. One filling only.

An appropriation for a reservoir is for one filling only. A decree for double-filling is erroneous. If all reservoirs have been filled once the question as to whether or not they can again be filled is undecided. *Windsor C. Co. v. Lake Supply Co.*, 44 Colo. 214-222, 98 Pac. 729.

Sec. 261. Use of returned water for reservoir.

See Appropriation, Sec. 56.

Syl. "Where water appropriated for mill purposes, after its use, is permitted to flow back into the stream undiminished, and is appropriated during the winter season for storage in a reservoir for future use in irrigation, the storage appropriator (below the point where the water is returned from the mill-race) acquires a prior right to the water during the season he has appropriated it that can not be defeated by a change of use by the mill owner either by transferring his right or by abandonment in favor of another appropriator." *Cache la Poudre R. Co. v. Water S. & S. Co.*, 27 Colo 532, 62 Pac. 420.

Sec. 262. When water may be stored.

"By Section 2270 Mills (Colo. Stat. Ann. 3202) * * * which confers the only authority for filling reservoirs, water

for storage in reservoirs can be used only when not needed for immediate domestic and irrigating uses * * * ." *Water S. & S. Co. v. Tenney, et al.*, 24 Colo. 344-351, 51 Pac. 505.

Sec. 263. Reservoir sites.

a. Filing map.

The approval by the Secretary of the Interior of a reservoir site filed pursuant to the provisions of the act of congress of March 3rd, 1891, 'subject to all vested existing rights,' conferred no right to construct a dam upon land occupied as an agricultural claim under the pre-emption laws of the United States, as against the occupant.

b. Forfeiture.

"The state courts have jurisdiction to hear and determine questions of forfeiture of grants to reservoir sites under the act of congress of March 3rd, 1891." *Baldrige v. The Leon L. D. & R. Co.*, 20 Colo. App. 518-519, 80 Pac. 477; *Nipple v. Forker, et al.*, 26 Colo. 74, 56 Pac. 577; *O'Reilly v. Noxon*, 49 Colo. 362.

Sec. 264. Undeveloped reservoirs.

An undeveloped reservoir, being constructed by a company whose contracts with water right holders entitle said holders to the property, passed with the canal to the water right holders. *New La Junta & L. C. Co. v. Kreybill*, 17 Colo. App. 26-27, 67

CHAPTER XXII.
RES ADJUDICATA.

Applicable to what matters § 265.

Decree in adjudication § 266.

Evidence § 267.

Identity of parties § 268.

In general § 269.

When applicable § 270.

See Adjudication, Sec. 15, 20, 23.

See Abandonment, Sec. 10

Sec. 265. Applicable to what matters.

Where there is a second action between the same parties regarding the same claim of right to water, the first action constitutes an absolute bar to the subsequent action "as to every matter which was offered and received to sustain or defeat the claim or demand, and as to every other substantial matter which might have been offered for that purpose; but where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters actually litigated and determined, and not what might have been. 94 U. S. 423-606." *Grand Valley I. Co. v. Fruita I. Co.*, 37 Colo. 483-500, 86 Pac. 324.

Sec. 266. Decree in adjudication.

See Adjudication, Sec. 16.

Syl. "A decree rendered in a statutory proceeding under the irrigation act to determine priorities to the use of water is conclusive as to the parties thereto." *Canal Co. v. Loutsenheizer D. Co.*, 23 Colo. 233, 48 Pac. 532; *Handy D. Co. v. South Side D. Co., et al.*, 26 Colo. 233, 58 Pac. 30; *Con.*

Home S. D. & R. Co. v. New Loveland & G. I. & L. Co., 27 Colo. 521, 62 Pac. 364; *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447, 76 Pac. 794.

"Was the adjudication of priorities as made, * * * * *res adjudicata* as to plaintiff's right? (Plaintiff Nichols was out of the state at the time of the adjudication and had no notice.) An affirmative answer would, in our opinion, give an undue effect to the irrigation acts of 1879 and 1881, and the adjudication of priorities thereunder. In (13 Colo. 111, 21 Pac. 1028), it was said of these irrigation acts, 'they are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, and to this end they provide a system of procedure for determining the priority of rights as between the carriers.' And again; 'the authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, *provided they do not substantially affect constitutional or vested rights*, is undoubted.' 13 Colo. pp. 134-137, 21 Pac. 1028 * * * Thus, in effect, the pro-rating statute, so called * * * was upon constitutional grounds limited in its operation. * * * Hence to deprive a person of his priority is to deprive him of a most valuable property right * * * . A priority of right to the use of water being property, is protected by our constitution so that no person can be deprived of it without 'due process of law.' *Const. Colo. Art. 2, Sec. 25; Cooley's Const. Lim.* (6th Ed.) 431, *et seq.*, * * *. But these sections (26 and 35 of the act of 1881) do not apply to an original proceeding for an adjudication of priorities by a party who has never had his day in court." *Nichols v. McIntosh*, 19 Colo. 34 Pac. 278.

The above case known as the "Nichols case," was overruled in *Broad Run Co. v. Deuel & Snyder Co.*, 47 Colo. 573-580, as follows: "In *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac 278, and *Greer v. Heiser*, 16 Colo. 306, 26 Pac. 770, there may be expressions inconsistent with what is here decided, but, if so, such former observations, or holdings have been modified or superseded by our later cases."

Sec. 267. Evidence.

"One who interposes a plea of *res adjudicata* must establish it by a fair preponderance of the evidence." *Grand Valley I. Co. v. Fruita I. Co.*, 37 Colo. 483-501, 86 Pac. 324.

Sec. 268. Identity of parties.

Syl. "One of the essential elements necessary to make a judgment in one case, *res adjudicata* in another is identity of parties in each. A judgment against a water commissioner enjoining him from shutting down the headgate of certain ditches in favor of a prior appropriator further down the stream, in an action in which the prior appropriator was not a party, although he had notice of the action, is not *res adjudicata* in an action by the prior appropriator against the owners of the ditches in whose favor the former judgment was rendered." *Lower Latham D. Co. v. Lauden I. C. Co., et al.*, 27 Colo. 267, 60 Pac. 629.

Sec. 269. In general.

See Abandonment, Sec. 10-15a-15c.

See Adjudication, Sec. 20.

The following cited cases deal with the subject of *res adjudicata*. 9 Colo. 327, 12 Pac. 213; 10 Colo. 327-528, 16 Pac. 691; 13 Colo. 111, 21 Pac. 1028; 16 Colo. 61, 26 Pac. 313; 17 Colo. 146, 28 Pac. 966; 18 Colo. 1, 30 Pac. 1032; 22 Colo. 102, 43 Pac. 535; 31 Colo. 224, 73 Pac. 249; 24 Colo. 322, 51 Pac. 496; 21 Colo. 257, 40 Pac. 460; 42 Colo. 144, 93 Pac. 1112; 37 Colo. 515, 86 Pac. 1042; 39 Colo. 61, 88 Pac. 1060; 23 Colo. 233, 48 Pac. 532; 26 Colo. 333, 58 Pac. 30; 27 Colo. 521, 62 Pac. 364; 32 Colo. 447, 76 Pac. 794; 28 Colo. 187, 63 Pac. 305; 39 Colo. 338, 90 Pac. 1023; 32 Colo. 102-460, 75 Pac. 391.

Sec. 270. When applicable.

Syl. "A judgment on the merits is only conclusive between the parties when the question to be determined in the

second action is the same question judicially settled in the first." *Water S. & S. Co. v. Larimer & Weld I. Co.*, 25 Colo. 87, 53 Pac. 386.

CHAPTER XXIII.

REVIEW AND REHEARING.

Petition for § 271.

Proceeding § 272.

Parties § 273.

Strangers attacking § 274.

To ditches § 275.

Good cause must be shown § 276.

Objections and exceptions § 277.

Sec. 271. Petition for.

A petition for the purpose of securing a review and rehearing must state a cause of action, that is to say, it must state facts from which it appears that the party applying for such reargument and review of the decree has been aggrieved thereby, so that the court to which such petition is addressed, may say upon inspection, if these facts be true, the decree should be modified. *Crippen-Lawrence Co. v. Burroughs, et al.*, 27 Colo. 155, 60 Pac. 487.

Sec. 272. Proceeding.

On an application under Colo. Statutes, for a review of a decree adjudicating water rights, the court has authority to vacate the decree pending the determination of the review. And where an order vacating the decree is entered and the application for review is afterwards dismissed, the court should re-enter the original decree.

"It is true, two years have been given by the statute for an application to re-open a decree, but it does not follow that, in every conceivable case, and in all circumstances, a party may have the full length of time for this purpose when he has negligently failed to avail himself of a prior opportunity

therefor." *Rio Grande L. & C. Co. v. Prairie D. Co.*, 27 Colo. 225-230, 60 Pac. 726.

Sec. 273. Parties.

If a decree be opened upon a proper showing by one party, another party not having the right to secure the original opening thereof can not be heard on independent objections. *Id.* 231.

Sec. 274. Strangers attacking.

"A stranger may move to set aside a decree if he is injuriously affected thereby." *Crippen, Trustee, v. The X. Y. I. D. Co.*, 32 Colo. 447-451, 76 Pac. 794.

Sec. 275. To Ditches.

See Decree, Sec. 16.

Sec. 276. Good cause must be shown.

"The statute allowing a review of a decree contemplates that good cause must be shown therefor; that a petition for this purpose must state a cause of action." *Crippen-Lawrence Co. v. Burroughs, et al.*, 27 Colo. 155-157, 60 Pac. 487; *Rio Grande L. & C. Co. v. Prairie D. Co.*, 27 Colo. 225-229, 60 Pac. 726.

Sec. 277. Objections and exceptions.

"If a party knowingly and intentionally neglects to apprise a court of his objections to a decree at the time it is rendered, when he has full opportunity to do so, even though he may be given, by the statute, two years within which to file a petition to reopen it, we think the right to do so, in so far as it is based upon a cause existing at the time the decree was rendered, is conditioned upon his having at that time made an objection to it, and saved an exception to an adverse ruling upon his objection." *Rio Grande L. & C. Co. v. Prairie D. Co.*, 27 Colo. 225-230, 60 Pac. 726.

CHAPTER XXIV.
STATE OFFICERS.

Duties of in distributing water § 278.

Parties in action to quiet title § 279.

Water commissioner § 280.

(a) Closing headgate of ditch.

(b) Compensation of.

(c) Loaning water.

(d) Powers.

Superintendent of irrigation § 281.

(b) Authority—Nature of.

(b) Action for fees.

(c) Compensation of.

See Canal Companies, Sec. 96.

See Vested Rights, Sec. 303.

See Distribution, Sec. 153.

See Pleading and Practice, Sec. 234i.

Sec. 278. Duties of in distributing water.

Primarily their duties are to enforce the decrees of the various claimants to and users of water, from a common source, according to their terms. These officers are not personally concerned in controversies between the various users of water, which may only be adjusted in proper proceedings, brought for that purpose, by those who are the real parties interested in and affected thereby." *Boulder D. Co. v. Hoover*, 48 Colo. 343-348, 110 Pac. 75.

"The impropriety of irrigation officers, seeking to have a matter, in which they have no personal or private right, determined, in an action in which they, in an official capacity only are defendants, is manifest. That question must be litigated in a suit between parties whose rights are directly involved. This suit is by the owner of a water right against

officials, charged with the duty of the distribution of water, under decreed rights, between the several users thereof, within their jurisdiction, to compel action accordingly. It is neither their duty nor privilege to question the decrees, where regular in form, in full force and unmodified, or to attempt to impeach and nullify them, or in any way impair their efficiency. While it may be that there is a degree of discretion vested in these officers respecting the discharge of their duties, it never was in contemplation that they should assume the burden of litigating questions of dispute between the several water claimants, with reference to their respective rights under decrees duly rendered and in full force." *Boulder D. Co. v. Hoover*, 48 Colo. 343-347-348, 110 Pac. 75.

"It is clear, from the evidence, that plaintiff seeks simply to apply the water decreed to the ditches in question in a new place. Whether this may lawfully and properly be done is not for the water commissioner, or his superior officers, acting in a judicial capacity and on their own initiative, to determine, as was in effect attempted when they declined to turn water out to satisfy the decrees in question. Such questions are between the several users of water for irrigation, who are directly affected, and can not be settled in a suit against the irrigation officials only. These executives may, and indeed should, prevent waste and insist upon economical use, but where there is a real and *bona fide* dispute as to the relative rights to the use of water under decrees, between several claimants, these officers are not called upon to inject themselves into the controversy and decide between them. There are no third parties here, and no claim is asserted in behalf of any such, and matters affecting the rights of those not before the court clearly may not be here adjudged. They could not be bound even if such adjudication were undertaken and effected." *Boulder D. Co. v. Hoover*, 48 Colo. 343-348-349, 110 Pac. 75.

Sec. 279. Parties in action to quiet title.

See Quieting Title, Sec. 249.

Sec. 280. Water commissioner.**a. Closing headgate of ditch.**

If one opens a headgate which has been closed by a water commissioner he is not liable for contempt of court especially in the absence in the decree in adjudication of any order for non-interference. *Roberson v. People, ex rel, Soule, Water Com.*, 40 Colo. 119, 90 Pac. 79.

b. Compensation of.

Water commissioners are entitled to compensation from the counties in their district only. *Fravert v. Board of County Coms. of Mesa Co.*, 39 Colo. 71, 88 Pac. 873; *Board of Comr's of Clear Creek Co. v. McLean*, 115 Pac. (Colo.) 525.

Syl. "Under Mills' Ann. St. Sec. 2387, (Colo. Stats. Ann. Sec. 3434), entitling a water commissioner to pay from the counties in which his district lies, one of three counties in which a district lies is liable for one-third of his compensation, though no services have been rendered in that county, though decreed priorities have not yet been established for ditches therein, and though there is less land irrigated in the county than in either of the other two counties." *Board of Comr's of Clear Creek Co. v. McLean*, 115 Pac. (Colo.) 525.

c. Loaning water.

"The water commissioner had no real interest in the questions involved in the case * * * , he was simply the agent designated by law for distributing, for purposes of irrigation, the waters of the district, and it was not any part of his duty to appear for said lenders and borrowers and defend their interests in the case any more than it was his duty to appear for and defend the rights of the plaintiffs in the case." *Squire, Water Com., v. Livezey, et al.*, 36 Colo. 302-304, 85 Pac. 181.

d. Powers.

A water commissioner is a police officer of the state but

not of a court. *Roberson v. People, ex rel. Soule, Water Com.*, 40 Colo. 119-125, 90 Pac. 79.

Sec. 281. Superintendent of irrigation.

a. Authority—Nature of.

"The power conferred is executive and not judicial."
Ind. D. Co. v. Ag. D. Co., 22 Colo. 513-526, 45 Pac. 444.

b. Action for fees.

If the superintendent of irrigation is appointed by the governor without the application of the county commissioners, he is a *de facto* officer at least, and the regularity of his appointment can not be raised in a collateral proceeding. *Board of Co. Com. of Montezuma Co. v. Wheeler*, 39 Colo. 207-212, 89 Pac. 50.

c. Compensation of.

"All of the counties which contain lands that are irrigated by water taken from any * * * streams mentioned in the act creating the water division, are * * * liable for their respective shares of the compensation earned * * *."
Chew v. Board of Co. Com. of Fremont Co., 18 Colo. App. 162-167, 70 Pac. 769; *Chapman v. Board of Co. Com. of Phillips Co.*, 17 Colo. App. 236, 68 Pac. 134.

CHAPTER XXV.

SUBTERRANEAN WATERS.

How considered and governed § 282.

Loss of water § 283.

(a) By evaporation.

(b) By percolation.

Percolating waters § 284.

(a) California rule.

(b) Diversion of.

(c) Ownership of.

(d) Presumption in regard to disappearing waters.

(e) Part of stream.

(f) What is not percolating water.

(g) Withdrawal of water of a stream by.

Seepage waters § 285.

Well—Near stream § 286.

Sec. 282. How considered and governed.

“The subterranean volume of water which finds its way through the sand and gravel constituting the beds of the streams which traverse the country adjacent to the mountains of this section, are recognized as a part of the waters of the stream to the same extent as though flowing upon the surface.” *Petterson v. Payne Water Com., et al.*, 43 Colo. 184-187, 95 Pac. 301; *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77, 53 Pac. 334; *Medano D. Co. v. Adams, Trustee*, 29 Colo. 317, 68 Pac. 431.

“That the surface bed of such a stream may not be visible does not change the rule with respect to this class of flowing water.” *Medano D. Co. v. Adams, Trustee*, 29 Colo. 317-326, 68 Pac. 431.

“Underground currents of water which flow in well-defined and known channels, the course of which can be distinctly traced, are governed by the same rules of law as streams flowing upon the surface. The channels and existence

of such streams, though not visible, are 'defined' and 'known' within the meaning of the law when their course and flow are determinable by reasonable inference, * * * 25 Colo. 77, 53 Pac. 334; 3 Colo. App. 430, 33 Pac. 280; *Kinney on Irrigation*, Sec. 48; *Gould on Waters*, Sec. 281; 16 Nev. 317." *Medano D. Co. v. Adams, Trustee*, 29 Colo. 317-326, 68 Pac. 431.

Sec. 283. Loss of water.

a. By evaporation.

"Given, in the dry season, a continuous bed of dry sand, of indefinite depth, for over six miles, without proof of bed rock or channel under the sand, where the small body of water is absorbed, it is an important question of fact whether the entire amount of water is not exhausted by evaporation, or whether percolating through the sand for that distance, any appreciable amount of water would be discharged during the irrigating season." *Reservoir Co. v. Irrigating Co.*, 8 Colo. App. 237-242, 45 Pac. 525.

b. By percolation.

"There is testimony to the effect that on account of the character of the bed of the Big Thompson, considerable time would be required for the water passing the headgates of the ditches of defendants to reach the river, and that in flowing down a considerable quantity would be lost through percolation. There is no evidence that the waters would not reach the river, and although it may flow down the Big Thompson slowly, and a considerable volume be lost, inasmuch as it would eventually reach the river, and could there be utilized by the plaintiff, we do not think that this defense has been established." *Lower Latham D. Co. v. Loudon I. C. Co., et al.*, 27 Colo. 267-276, 60 Pac. 629.

Sec. 284. Percolating waters.

See Evidence, Sec. 181d.

a. California rule.

The rule in California is "That the right of an owner of land to use water percolating therein is the right only to a

reasonable use thereof for the benefit and enjoyment of his land. To what extent, if at all, the common law doctrine of ownership of percolating water shall be modified, was held to depend upon the particular facts of the case, but in any controversy of this nature the general doctrine *cujus est solum, ejus est usque ad coelum et ad inferos* (of whom is the land, of him is it also to the sky and to the deepest depths) might be, the court said qualified by the maxim *sic utere tuo ut alienum non laedas* (so use your own that another you may not injure). 141 Cal. 116, 275, 74 Pac. 766; * * * 142 Cal. 437, 76 Pac. 232; 77 Pac. 1113." *Smith C. or D. Co. v. Colo. I. & S. Co.*, 34 Colo. 485-491, 82 Pac. 940.

b. Diversion of.

"Diversion by this means can not be permitted when the rights of others are injuriously affected, for the natural and direct sources supplying the natural streams of the state must be protected from invasion; otherwise the rights of appropriators could be destroyed." *Buckers I. M. & I. Co., et al. v. Farmers' I. D. Co.*, 31 Colo. 62-71, 72 Pac. 49.

c. Ownership of.

Percolating water, "existing in the earth, belongs to the soil, is a part of the realty and may be used and controlled to the same extent by the owner of the land, but the owner of land on which a stream rises has no right to divert the water flowing therefrom to the prejudice of prior appropriators of water from a stream naturally fed thereby." *Bruening v. Dorr*, 23 Colo. 195-196, 47 Pac. 290.

Mr. Justice Campbell announces in 44 Colo. 491, 99 Pac. 322, that the law regulating ownership of percolating waters has not been decided in Colorado.

d. Presumption in regard to disappearing waters.

"It will be presumed that water flowing in a natural channel, which reaches the banks of a stream and there disappears in the sands of the bed, augments the flow in the

main stream by percolation, until the contrary is shown * * *"
Petterson v. Payne, Water Co., et al., 43 Colo. 184-187, 95
Pac. 301; *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25
Colo. 77, 53 Pac. 334.

e. Part of stream.

"By these ditches the defendant companies not only intercepted the original surface flow of these streams and withdrew water from the sloughs or lakes supplying them, but have likewise diverted the water saturating the sand and gravel constituting the bed of their channels and sources. This water is as much a part of the several streams as the surface water, and is governed by the same rules." *Buckers I. M. & I. Co., et al. v. Farmers' Ind. D. Co.* 31 Colo. 62-70, 72 Pac. 49; *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77, 53 Pac. 334; *McClellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280.

f. What is not percolating water.

"No question of percolating waters is involved, because the water passing through the sand and gravel constituting the bed of a stream and the land so nearly adjacent that the only and natural outlet would be through such channel, are not percolating waters, as ordinarily defined by the common law; but, as already stated, are a part of the waters of the stream." *Buckers I. M. & I. Co. et al., v. Farmers' Ind. D. Co.*, 31 Colo. 62-71, 72 Pac. 49; *Medano D. Co. v. Adams, Trustee*, 29 Colo. 317-326, 68 Pac. 431.

g. Withdrawal of water of a stream by—.

"An appropriator of water from a stream who is required to permit sufficient water to flow by his headgate to supply senior appropriations below, may maintain an action to abate a subsequent ditch, below his, constructed in such a manner as to depth, grade and proximity to the stream as to withdraw from the stream by percolation part of the water after it has passed his headgate." *Platte Valley I. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77-78, 53 Pac. 334. *Gabbert, J.*, dissenting.

Sec. 285. Seepage waters.

Seepage water can not be appropriated after it has returned to the natural stream. *LaJara C. & L. S. Assn. v. Hansen*, 35 Colo. 105-108; 83 Pac. 644; *Water S. & S. Co. v. Larimer & Weld I. Co.*, 25 Colo. 87-94, 53 Pac. 386; *Kinney on Irrigation*, Secs. 183-259; *Clark, et al. v. Ashley, et al.*, 34 Colo. 285, 82 Pac. 588; *McLellan v. Hurdle*, 3 Colo. App. 430-434, 33 Pac. 280.

See Change of Point of Diversion, Sec. 106a.

Sec. 286. Well—Near stream.

"The withdrawal by means of the well, of water actually flowing in the stream, could not be permitted, to the injury of the prior rights of appellees. * * * *Wilson v. Ward*, 26 Colo. 39-44; *McLellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280.

CHAPTER XXVI.

TAXATION.

Cities—Purchasing land for the water—Exemption § 287.

Ditches—Exemption § 288.

License tax—Annual § 289.

Sec. 287. Cities—Purchasing land for the water—Exemption.

In case a city or town purchases land for the water right belonging thereto, and segregates the water from the land, then leases the land, which may be in another county, such land can not be taxed. *City of Colo. Springs v. Board of Co. Com. of Fremont Co.*, 36 Colo. 231, 84 Pac. 1113.

Sec. 288. Ditches—Exemption.

Syl. "Where a ditch company conveyed to the consumers under the ditch, water rights by deeds which vested in them the right to the perpetual use of a certain amount of water flowing through the ditch and with a proviso that when the company had sold water rights to the extent of the carrying capacity of the ditch, the ditch system should be turned over to the holders of the water right, so long as the company retains an interest in the ditch with water rights unsold (which rights it is attempting to sell in order to make a profit by the sale) it is not exempt from taxation under the constitution and statutes exempting ditches owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations or the individual members thereof." *Murray v. Board of Co. Com. of Montrose Co.*, 28 Colo. 427, 65 Pac. 26.

"By this provision of the constitution (Sec. 3, Art. 10) ditches, canals and flumes may be divided into three general classes: (1) Those owned by one or more individuals, and

exclusively used for irrigating the lands of said individuals, or the lands of any of them; (2) those owned by a corporation, and exclusively used for irrigating lands belonging to the corporation and lands belonging to shareholders of the corporation; or lands of the corporation or the shareholders, or any thereof; (3) those owned in part by a corporation and partly by individuals, and exclusively used for irrigating lands belonging to the corporation and to said individual owners, or the lands of the corporation or said individuals or any thereof." *Empire C. Co. v. Rio Grande Co.*, 21 Colo. 244-248, 40 Pac. 449.

"It also appears * * * that by these contracts of purchase, the grantees of water rights have acquired an interest in the canal itself, and that the complete ownership of the canal is vested in the plaintiff corporation and its individual grantees, so that the canal has always been exclusively devoted to one, or both, of two uses, viz: *first*, for irrigating lands owned by the plaintiff corporation and lands owned by its individual shareholders; *second*, for irrigating lands owned by the plaintiff corporation and by individuals who, by their contract with the plaintiff for the purchase of water rights, have secured a partial ownership in said canal, which canal was and now is owned by the plaintiff corporation and by said individual grantees." *Id.* 250.

Sec. 289. License tax—Annual.

The annual license tax may be paid at any time prior to a hearing or the trial of a cause and no further question can be raised in regard thereto. *Rollins v. Fearnley*, 45 Colo. 319-323, 101 Pac. 345.

CHAPTER XXVII.

TITLE.

To water—How proven § 290.

To water—Unappropriated § 291.

To water—Appropriated § 292.

See Evidence, Sec. 193.

Sec. 290. To water—How proven.

Title to water need not be proven by a perfect chain of "paper" titles. "Proof of possession and use is *prima facie* evidence of right * * * ." *Bates v. Hall*, 44 Colo. 360-363, 98 Pac. 3.

Sec. 291. To water—Unappropriated.

Syl. "By the constitution, title to the unappropriated waters of the state is vested in the public, with a perpetual right to its use in the people." *Wheeler v. Northern C. I. Co.*, 10 Colo. 582, 17 Pac. 487.

Sec. 292. To water—Appropriated.

Syl. "After appropriation, except perhaps as to the quantity actually flowing in the consumer's ditch or lateral, the title remains in the public, with the paramount right of user, unless forfeited, in the appropriator." *Id.* 582.

CHAPTER XXVIII.

VESTED RIGHTS.

Accruing prior to the adoption of the constitution § 293.

Antedating constitution § 294.

Antedating legislation § 295.

Before patent § 296.

Pleading in equity to maintain vested right § 297.

Protected by constitution § 298.

Definition of § 299.

Junior appropriator as against a senior appropriator § 300.

Prior to statute § 301.

Recognized by first legislature § 302.

State engineer interfering with § 303.

See Change of Point of Diversion, Sec. 113b.

See Appeals, Sec. 34a.

See Appropriation, Secs. 71-62a.

Sec. 293. Accruing prior to the adoption of the constitution.

"It follows * * * that the court erred in construing the section of the constitution as authorizing an interference, impairment, or injury of the rights of prior appropriators for irrigating purposes vested before the adoption of the constitution, for the purpose of supplying water for domestic purposes to later comers." *Armstrong v. Larimer D. Co.*, 1 Colo. App. 49-59, 27 Pac. 235.

Sec. 294. Antedating constitution.

Syl. "Rights acquired to the use of water for irrigation, prior to the adoption of our state constitution cannot be taken by a city for the domestic use of its inhabitants, without compensation." *Strickler v. City of Colo. Springs*, 16 Colo. 61, 26 Pac. 313.

Sec. 295. Antedating legislation.

"The right to water in the streams of Colorado, by prior appropriation, antedated any legislation." *Armstrong v. Larimer Co. D. Co.*, 1 Colo. App. 49, 57.

"The right itself and the obligation to protect it existed prior to legislation on the subject of irrigation." *Coffin, et al., v. Left Hand D. Co.*, 6 Colo. 443-446.

Sec. 296. Before patent.

That there may be a vested right in and to land before patent is inferentially held in *Baldrige v. The Leon L. D. & R. Co.*, 20 Colo. App. 518-522, 80 Pac. 477.

Sec. 297. Pleading in equity to maintain vested right.

See Pleading and Practice, Sec. 222d.

Sec. 298. Protected by constitution.

"The error into which the learned judge seems to have fallen was in regarding these constitutional provisions as retrospective and so far retroactive as to impair, if not destroy, property rights acquired long before its adoption. Such can not be its construction. It must be construed to be declaratory of, and not destructive of, the rights and powers enjoyed by the people before its adoption." *Armstrong v. Larimer D. Co.*, 1 Colo. App. 49-58, 27 Pac. 235.

"These priorities are protected by the constitution and can not be interfered with by legislative action." *Larimer & Weld I. Co. v. Wyatt*, 23 Colo. 480-491, 48 Pac. 528.

Sec. 299. Definition of.

The right to the use of water is property; the title accrues by legal appropriation, and becomes vested as of the date of such appropriation.

Sec. 300. Junior appropriator as against a senior appropriator.

"A junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation." *Vogel v. Minn. Co.*, 47 Colo. 534-541, 107 Pac. 1108.

Sec. 301. Prior to statute.

The question is raised but not decided in *Farmers' Union D. Co. v. Rio Grande C. Co., et al.*, 37 Colo. 512-522, 86 Pac. 1042.

Sec. 302. Recognized by first legislature.

"The right to water by prior appropriation was recognized by the first legislature of the territory * * * ." *Armstrong v. Larimer D. Co.*, 1 Colo. App. 49-57, 27 Pac. 235.

"The general government, in which was the fee to both land and water at the time of the settlement, and for many years afterward, acquiesced in the disposition of the water according to local customs and in July, 1866, passed an act (see Act of Congress 1866)." *Id.* 57.

Sec. 303. State engineer interfering with.

"Vested rights to the use of water can not be taken away by the state engineer." 12 *Current Law*, 2298; *Lockwood v. Freeman*, 15 Idaho, 395, 98 Pac. 294.

CHAPTER XXIX.

WATER RIGHT.

Property right § 304.

Lessee may acquire § 305.

Not a grant § 306.

More than one in same ditch § 307.

Proof of § 308.

Sec. 304. A property right.

"Rights to the use of water for a beneficial purpose, whatever the use may be, are property, in the full sense of that term, and are protected by *Sec. 15, Art. 2* of our Constitution, which says that 'Private property shall not be taken or damaged for public or private use without just compensation.'" *Town of Sterling v. Pawnee D. E. Co.*, 42 Colo. 421-426, 94 Pac. 339; *Canal Co. v. Loutsenheizer*, 23 Colo. 233, 48 Pac. 532; *Cash v. Thornton*, 3 Colo. App. 475, 34 Pac. 268; *Ft. Morgan L. & C. Co. v. South Platte D. Co.*, 18 Colo. 1-2, 30 Pac. 1032.

Sec. 305. Lessee may acquire.

A lessee or occupant of land may acquire and own a water right.

"We know of no reason why the lessee of land may not buy and hold a water right, or why the mere occupant of land may not become the owner of a water right, and use it himself or sell it to someone who will use it." *Cooper v. Shannon*, 36 Colo. 98-105, 85 Pac. 175.

Sec. 306. Not a grant.

"The acquisition of the right to the use thereof (water) results from such appropriation, and not from a grant by the

state." *New Mercer D. Co. v. Armstrong*, 21 Colo. 357-366, 40 Pac. 989.

Sec. 307. More than one in same ditch.

Syl. "While * * * there may be but one ditch, yet there may be two distinct legal entities therein which have never merged. * * * " *Petterson v. Brown, etc., D. Co.*, 3 Colo. App. 511, 34 Pac. 769.

Sec. 308. Proof of.

Syl. "As water rights are not appurtenances, proof of title to the land on which they have been used is not required in an action between the purchasers thereof to determine their respective rights." *Bloom v. West*, 3 Colo App. 212, 32 Pac. 846.

Colorado Irrigation Statutes

CHAPTER XXX.

CONSTITUTIONAL PROVISIONS.

Water, public property § 5, Art. 16.

Diverting unappropriated water—Priority § 6, Art. 16.

Right of way for ditches, flumes § 7, Art. 16.

County commissioners fix rates for water § 8, Art. 16.

Sec. 5, Art. 16 Waters, public property.

The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Sec. 6, Art. 16. Diverting unappropriated water—Priority.

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Sec. 7, Art. 16. Right of way for ditches, flumes.

All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8, Art. 16. County Commissioners fix rates for water.

The general assembly shall provide by law that the board of county commissioners in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

CHAPTER XXXI.

COLORADO CORPORATION IRRIGATION STATUTES.

1. Ditch companies §§ 988-997.
2. Flume and pipe line companies §§ 998-999.
3. Water Users' Associations §§ 1000-1001.

I. DITCH COMPANIES.

Section.

988. Additional statements in certificate.
 989. Commencement and completion of work after organization.
 990. Right of way—Prior rights protected.
 991. Assessments by stockholders when levied.
 992. Shall furnish water to whom—Rate.
 993. Shall keep ditch in repair.
 994. Penalty for damaging ditch, road, flume.
 995. Consolidation of ditch companies.
 996. Extension of term.
 997. Extension—Notice—Meeting—Vote—Certificate filed.
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988. Additional statements in certificates.

SEC. 144. When any three or more persons associate under the provisions of this chapter to form a corporation for the purpose of constructing a ditch, reservoir, pipe line, or any part thereof, for the purpose of conveying water from any natural or artificial stream, channel or source whatever, to any mines, mills or lands, or storing the same, they shall in their certificate, in addition to the matters required in section 2 of this chapter, specify as follows, viz.: The stream, channel or source from which the water is to be taken, the point or place at or near which the water is to be taken out, the location as near as may be, of any reservoir intended to be constructed, the line as near as may be, of any ditch or pipe line intended to be constructed, and the use to which the water is intended to be applied.

[Laws 1891, p. 97, § 1.]

[Section 2 referred to is section 847.]

[Ditch company may take stock in telephone company, section 878.]

989. Commencement and completion of work after organization.

SEC. 145. Any company formed under the provisions of this act for the purpose of constructing any ditch, flume, bridge, ferry

or telegraph line, shall, within ninety days from the date of their certificate, commence work on such ditch, flume, bridge, ferry or telegraph line, as shall be named in the certificate, and shall prosecute the work with due diligence, until the same is completed, and the time of the completion of any such ditch, bridge, ferry or telegraph line shall not be extended beyond a period of two years from the time work was commenced as aforesaid; and any company failing to commence work within ninety days from the date of the certificate, or failing to complete the same within two years from the time of commencement as aforesaid, shall forfeit all right to the water so claimed, and the same shall be subject to be claimed by any other company; the time for the completion of any flume constructed under the provisions of this act shall not be extended beyond a period of four years; *Provided*, This section shall not apply to any ditch or flume for mining or other purposes, constructed through and upon any grounds owned by the corporation; *And provided, further*, That any company formed under the provisions of this act to construct a ditch for domestic, agricultural, irrigating, milling and manufacturing purposes, or any or either thereof, shall have three years from the time of commencing work thereon within which to complete the same, but no longer.

[Laws 1864, p. 61, § 42.]

990. Right of way—Prior rights protected.

SEC. 146. Any ditch, reservoir or pipe line company formed under the provisions of this chapter, shall have the right of way over the line named in the certificate, and shall also have the right to run water from the stream, channel or water source, whether natural or artificial, named in the certificate through its ditch or pipe-line, and store the same in any reservoir of the company when not needed for immediate use; *Provided*, That the line proposed shall not interfere with any other ditch, pipe-line or reservoir, having prior rights, except the right to cross by pipe or flume; nor shall the water of any stream, channel or other water course, whether natural or artificial, be diverted from its original channel or source, to the detriment of any person or persons having priority of right thereto, but this shall not be construed to prevent the appropriation and use of any water not theretofore utilized and applied to beneficial uses.

[Laws 1891, p. 98, § 2.]

991. Assessment by stockholders—When levied.

SEC. 147. Any corporation owning any ditch or canal for conveying, or reservoir for storing water for irrigating purposes, and

the capital stock being fully subscribed and paid up, and when such corporation shall have no income sufficient to keep its ditch, canal or reservoir in good repair, such corporation shall have power to make an assessment on the capital stock thereof, to be levied, pro rata, on the shares of stock, payable in money, or labor, or both, for the purpose of keeping the property of such corporation in good repair and for the payment of any claim against such corporation not otherwise provided for. But no such assessment shall be made unless the question of making such assessment shall first be submitted to the stockholders of such corporation, at an annual meeting, or at a special meeting called for that purpose, and a majority of the stockholders, either in person or by proxy, voting thereon, shall vote in favor of making such assessments, and an action may be maintained to recover any assessment against any delinquent shareholder, as provided in section five (5) of this act.

[G. S. § 310. G. L. § 276.]

[Section 5 referred to is found as amended in section 850.]

992. Shall furnish water to whom—Rate.

SEC. 148. Any company constructing a ditch under the provisions of this act, shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designated to be used, whether miners, mill-men, farmers or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give the preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners, as soon as such ditch shall be completed and prepared to furnish water.

[G. S. § 311. G. L. § 277.]

[For power of county commissioners to fix water rate, see sections 3262-3275.]

993. Shall keep ditch in repair.

SEC. 149. Every ditch company organized under the provisions of this act shall be required to keep their ditch in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property; and whenever it is necessary to convey any ditch over, across, or above any lode or mining claim, or to keep the water so conveyed therefrom, the company shall, if necessary to keep the water of said ditch out, or from any claim, flume the ditch so far as necessary to protect such claim or property from the water of said ditch.

[G. S. § 312. G. L. § 278.]

994. Penalty for damaging road, ditch or flume.

SEC. 150. Any person who shall wilfully or maliciously damage or interfere with any road, ditch, flume, bridge, ferry, railroad or telegraph line, or any of the fixtures, tools, implements, appurtenances or any property of any company which may be organized under the provisions of this act, upon conviction thereof before any court of competent jurisdiction in the county where the offense shall have been committed, shall be deemed guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, at the discretion of the court, said imprisonment not to exceed one year, and said fine not to exceed five hundred dollars, which fine shall be paid into the county treasury for the use of the common schools, and said offender shall also pay all damages that any such corporation may sustain, together with costs of suit.

[Laws 1864, p. 62, § 45.]

995. Consolidation of ditch companies.

SEC. 151. Companies organized under the laws of this state holding ditches or canals by virtue of their organization, which derive their supply of water for their respective ditches or canals from the same head gate or gates, or the same source or sources of supply, may consolidate their interests and unite their respective companies under one name and management, by filing a certificate of that fact in the office of the secretary of this state, and a counterpart thereof in the office of the recorder of the county or counties in which such ditches or canals are situated; which certificate shall be signed by the presidents of the companies so uniting, with the common seals of the companies affixed thereto; and shall set forth the fact of such union of interests, and give the name of the new company thus formed.

[Laws 1876, p. 68, § 1.]

996. Extension of term of ditch companies.

SEC. 152. When the term of years for which any corporation which has been, or may hereafter be, incorporated as a ditch company for the purpose of carrying water for irrigation purposes, or, as a reservoir company for the storage of water for irrigation purposes, has expired, or, is about to expire by lawful limitation, and such corporation has not been administered upon as an expired corporation or gone into liquidation and settlement and division of its affairs, it may have its term of incorporation extended and continued, the same as if originally incorporated, as hereinafter provided.

[Laws 1891, p. 96, § 1.]

997. Same—Meeting—Notice—Vote—Certificate filed.

SEC. 153. Whenever the corporate life of any ditch or reservoir company has expired or is about to expire, as aforesaid, the stockholders of such company may vote upon the question of extending the life of such corporation for another twenty years, or less, by first giving notice of such intention, by publication, for two successive weeks, in the newspaper printed nearest the place where the principal operations of said company are carried on. Such notice shall be signed by stockholders owning at least ten per cent. of the entire capital stock of said company, and shall state the place where, and the time when, the question of renewal will be submitted to the votes of the stockholders of said company, at the meeting held in pursuance of such notice, provided a majority of the stock of the corporation be represented. The votes shall be taken by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company, or holds proxies therefor; and if a majority of the votes cast shall be in favor of a renewal of the corporation, the president and secretary of said company shall, under the corporate seal of said company, certify the fact, and shall make as many certificates as may be necessary, so as to file one in the office of the recorder of deeds in each county where they may do business, and one in the office of the secretary of state; and thereupon the corporate life of said company shall be renewed for another term of not exceeding twenty (20) years, upon filing the declaration, aforesaid and all stockholders shall have the same rights in the renewed corporation as they had in the company as originally formed.

[Laws 1891, p. 96, § 2.]

[For fees and annual report of ditch companies see sections 901 to 912.]

IX. PLUME AND PIPE LINE COMPANIES.**Section.**

998. Additional statements in certificate for flume companies.

999. Additional statements in certificate for pipe line companies—
Right of way.

998. Additional statements in certificate for flume companies.

SEC. 154. When any company shall organize, under the provisions of this act, to form a company for the purpose of constructing a flume, their certificate, in addition to the matters required in the second section of this act, shall specify as follows: The place of beginning, the terminus, and the route so near as may be, and the purpose for which such flume is intended, and where or

ganized, according to the provisions of this act, said company shall have the right of way over the line proposed in such certificate for such flume; *Provided*, It does not conflict with the rights of any former fluming, ditching, or other company.

[Laws 1864, p. 59, § 35.]

[Section 2 above referred to is section 847.]

999. Additional statements in certificate for pipe line companies—Right of way.

SEC. 155. Whenever any three or more persons associate under the provisions of said chapter XIX, of the general statutes of the state of Colorado, to form a company, for the purpose of constructing a pipe line for the conveyance of gas, water or oil, they shall in their certificate, in addition to the matters required in section 2 (two) of said chapter XIX, specify as follows: The places from and to which it is intended to construct the proposed line or lines, and any pipe line company formed under the provisions of said chapter XIX, shall have the right of way over the line or lines named in the certificate, and shall also have the right to convey gas, water or oil by said lines as stated in such certificate, through lands of the state of Colorado, and lands of individuals, with the right to erect thereon pump stations, storage tanks, and other buildings necessary for such business, and if any such corporation shall be unable to agree with such individuals owning any of such lands for the purchase of any real estate required for the purpose of any such corporation or company, or the transaction of the business of the same, or for right of way, or any other lawful purpose connected with or necessary to the operation of said company, such corporation may acquire such title in manner provided by law.

[Laws 1891, p. 94, § 1.]

[Section 2 of chapter 19 referred to is section 847.]

[For fees and annual report of flume and pipe line companies see sections 901 to 912.]

[Flume and pipe line companies may exercise the right of eminent domain, section 2436.]

X. WATER USERS' ASSOCIATIONS.

Section.

1000. Exempt from income and annual tax—Incorporation fee.

1001. May furnish recorder with books for recording stock subscriptions.

1000. Exempt from income and annual tax—Incorporation fee.

SEC. 156. That any water users' association which is organized in conformity with the requirements of the United States,

under the reclamation act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be exempt from the payment of any income tax and from the payment of any annual franchise tax, but shall be required to pay, as preliminary to its incorporation, only a fee of twenty (20) dollars for the filing and recording of its articles of incorporation and the issuance of certificate of incorporation.

[Laws 1905, p. 360, § 1.]

1001. May furnish recorder with books for recording stock subscriptions.

SEC. 157. That any water users' association organized in conformity with the requirements of the United States, under the reclamation act of June 17, 1902, may, with the consent of the county commissioners, furnish the clerk and recorder of any county in Colorado, a book, or books, containing printed copies of its articles of incorporation and forms of subscription for stock, and the county clerk and recorder to whom such book or books shall be furnished, shall use the same for recording the stock subscriptions in such association, and the charges for the recording thereof shall be made on the basis of the number of words actually written therein.

[Laws 1905, p. 360, § 2.]

[Act of June 17, 1902, referred to is found in volume 32, Stat. L. p. 388.]

[For annual report of water users' association see section 911.]

[Are the above two sections repealed by section 5595?]

CHAPTER XXXII.

COLORADO IRRIGATION STATUTES.

1. Right of way—Appropriation—Use of water §§ 3165-3232.
 2. Duties of owners §§ 3233-3261.
 3. Rate of charge for water §§ 3262-3275.
 4. Adjudication of priorities §§ 3276-3320.
 5. State engineer §§ 3321-3334.
 6. Irrigation divisions—Division engineers §§ 3335-3352.
 7. Water districts—Water commissioners §§ 3353-3439.
 8. Irrigation districts §§ 3440-3494.
 - 8-A. Drainage Districts §§ 3494-H.-3494-03.
 9. Offenses §§ 3495-3498.
 10. State canals and reservoirs and the control thereof §§ 3499-3562.
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I. RIGHT OF WAY—APPROPRIATION—USE OF WATER.

Section.

3165. Owners of land on streams entitled to use of water.
3166. (Repealed.)
3167. Right of way through other lands.
3168. Extent of right of way.
3169. Condemnation of right of way.
3170. No land burdened with more than one ditch, except.
3171. Shortest route must be taken.
3172. Owner of ditch must permit others to enlarge.
3173. When head of ditch may be extended up stream—Condemnation.
3174. Only irrigation ditches referred to in above section.
3175. Water to be pro rated among consumers.
3176. Irrigation of meadows—Right to make ditch—Priority.
3177. Priority of right to seepage or spring water.
3178. Water appropriated for domestic purposes shall not be employed for irrigation.
3179. Penalty for misapplication—Jurisdiction of justice.
3180. Right to place wheel on stream.
3181. Map of ditch or reservoir to be filed.
3182. Statement attached to map.
3183. Statement in case of enlargement—Temporary map.
3184. Statement must be signed and sworn to.
3185. State engineer examine maps and statements—Return duplicate—Duplicate filed with recorder.
3186. Certified copy evidence—Diligent construction.
3187. Compliance with former act.
3188. Petition to establish or enlarge drain.
3189. Contents of petition—Plat.

- 3190. Bond of petitioner.
- 3191. Board of viewers—Duties—Hearing—Notice.
- 3192. Hearing—Evidence—Report—When joint hearing.
- 3193. When improvement not feasible.
- 3194. When feasible—Report—Appeal.
- 3195. Allotment of work—Bond.
- 3196. When work let by contract—Advertise for bids—Bond.
- 3197. Completion—Expense pro rated—County treasurer collect.
- 3198. Acceptance—Vouchers.
- 3199. Compensation of engineers and viewers.
- 3200. Right of eminent domain.
- 3201. Disposition of water drained.
- 3202. Right to take water for reservoir—Right of way—Embankment.
- 3203. Conducting water in streams—Taking out—How amount determined.
- 3204. Liability of owner for damage.
- 3205. Construction of reservoirs—State engineer supervise.
- 3206. Cost of inspection and supervision paid by owner.
- 3207. Engineer determine amount of water to be stored.
- 3208. Water commissioner withdraw excess water—Close inlets.
- 3209. Complaint that reservoir is unsafe—Duty of engineer.
- 3210. Engineer may use force—Violation of engineer's order.
- 3211. Expense of examination—By whom paid.
- 3212. Appeal from decision of engineer.
- 3213. Owner liable for damages in case of breakage of reservoir.
- 3214. Violation of act—Penalty—Disposition of fines.
- 3215. Survey of reservoir site on arid land.
- 3216. Construction of reservoir—County surveyor supervise.
- 3217. Completion—Plat filed—Contents.
- 3218. Approval of plat—Duty of owner.
- 3219. Inspection—Notice to owner—Failure to repair.
- 3220. Compensation of county surveyor—By whom paid.
- 3221. Damages.
- 3222. Exchange of water less seepage.
- 3223. Must maintain flumes and register water.
- 3224. Water commissioner keep record.
- 3225. Reservoirs and ditches may exchange.
- 3226. Changing point of diversion—Petition—Practice and procedure.
- 3227. Notice to parties affected—When change allowed.
- 3228. Several applications in one—Consolidation—Process.
- 3229. Certified copy of decree filed—Notice of change.
- 3230. Change to other district—Copy of decree filed.
- 3231. Re-arguments, reviews and appeals.
- 3232. Owner may exchange or loan water rights.

3165. Owners of land on streams entitled to use of water.

SECTION 1. All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of the state of Colorado, as defined in the constitution of said state, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the

water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes.

[G. S., § 1711; G. L., § 1372; R. S., p. 362, § 1; Laws 1861, p. 67, § 1.]

[Water rights conveyed as real estate, section 669.]

[When ditch exempt from taxation, sections 5545 and 5546.]

[Mechanic's lien attaches to water rights. Section 4031.]

3166. (Repealed.)

[Repealed by Laws 1911, S. B. No. 103, § 1.]

3167. Right of way through other lands.

SEC. 3. When any person owning claims in such locality has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm, or land used by him for agricultural purposes, is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of lands which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes hereinbefore stated.

[G. S., § 1712; G. L., § 1373; R. S., p. 363, § 2; Laws 1861, p. 67, § 2.]

3168. Extent of right of way.

SEC. 4. Such right of way shall extend only to a ditch, dyke or cutting, sufficient for the purpose required.

[G. S., § 1713; G. L., § 1374; R. S., p. 363, § 3; Laws 1861, p. 67, § 3.]

3169. Condemnation of right of way.

SEC. 5. Upon the refusal of the owners of tracts of land or lands through which said ditch is proposed to run, to allow of its passage through their property, the person or persons desiring to open such ditch may proceed to condemn and take the right of way therefor (under the provisions of chapter thirty-one of these laws concerning eminent domain).

[G. S., § 1715; G. L., § 1376.]

[Chapter 31 above referred to is found in its amended form between sections 2415 and 2434.]

3170. No land burdened with more than one ditch, except.

SEC. 6. That no tract or parcel of improved or occupied land in this state, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting

and conveying all the water necessary to be conveyed through such property in one ditch.

[G. S., § 1716; Laws 1881, p. 164, § 1.]

3171. Shortest route must be taken.

SEC. 7. Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable, upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon land or lands of the person or persons constructing such ditch.

[G. S., § 1717; Laws 1881, p. 164, § 2.]

3172. Owner of ditch must permit others to enlarge.

SEC. 8. No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch.

[G. S., § 1718; Laws 1881, p. 164, § 3.]

3173. When head of ditch may be extended up stream—Condemnation.

SEC. 9. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause, as to prevent any ditch, canal or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the owner or owners of such ditch, canal or feeder shall have the right to extend the head of such ditch, canal or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for that purpose shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream, through such ditch, canal or feeder as to any such ditch, canal or feeder shall remain unaffected in any respect by reason of such extension: *Provided, however,* That no such extension shall interfere with the complete use or enjoyment of any ditch, canal or feeder.

[G. S., § 1719; Laws 1881, p. 161, § 1.]

[For right of condemnation for new ditch see section 3169.]

3174. Only irrigation ditches referred to in the last above section.

SEC. 10. This act shall apply to and effect only ditches, canals or feeders used for carrying water for the purpose of irrigation, and for no other purpose whatever.

[G. S., § 1721; Laws 1881, p. 162, § 3.]

3175. Water to be pro rated among consumers.

SEC. 11. If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders or stockholders thereof, as the parties purchasing water therefrom, and parties taking water partly under and by virtue of holding shares, and partly by purchasing the same, to each his share pro rata, according to the amount he, she or they (in cases in which several consume water jointly) shall be then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to which he, she or they should have received in case no such deficiency of water had occurred.

[G. S., § 1722; Laws 1879, p. 97, § 4.]

3176. Irrigation of meadows—Right to make ditch—Priority.

SEC. 12. All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of the water supplied by such stream, from any cause, prevent such irrigation therefrom in as ample a manner as formerly, have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she or they first occupied and used such land as meadow ground.

[G. S. § 1723; Laws 1879, p. 106, § 37.]

3177. Priority of right to seepage or spring water.

SEC. 13. That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring

waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; *Provided*, That the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands.

[Laws 1889, p. 215, § 1.]

[Right to water hoisted from mine. Section 4231.]

3178. Water appropriated for domestic purposes shall not be employed for irrigation.

SEC. 14. Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever; *Provided*, That the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants to such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes.

[Laws 1891, p. 402, § 1]

3179. Penalty for misapplication—Jurisdiction of justice.

SEC. 15. Any person claiming the right to divert water for domestic purposes from any natural stream who shall apply or knowingly permit the water so diverted to be applied for other than domestic purposes to the injury of any other person entitled to use such water for irrigation shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than fifty dollars and not exceeding two hundred dollars in the discretion of the court wherein conviction is had. Each day of such improper application of water obtained in the manner aforesaid shall be deemed a separate offense. Justices of the peace in their several precincts shall have jurisdiction of the aforesaid offense subject to the right of appeal as in cases of assault and battery.

[Laws 1891, p. 402, § 2.]

[For right of appeal in cases of assault and battery see section 3869.]

3180. Right to place wheels on streams—Condition.

SEC. 16. All persons on the margin, brink, neighborhood or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel, or other machine for the purpose of raising water to the level required for the purpose of irrigation, and the right of way shall not be refused by

the owner of any tract of land upon which it is required, subject of course to the like regulations, as required for ditches, and laid down in sections hereinbefore enumerated.

[G. S., § 1727; G. L., § 1377; R. S., p. 364, § 6.]

3181. Map of ditch or reservoir to be filed.

SEC. 17. Every person, association or corporation hereafter constructing or enlarging any reservoir or reservoirs or constructing, changing the location of, or enlarging any ditch, canal or feeder for any ditch or reservoir, for the purpose of furnishing a supply of water for domestic, irrigation, power, storage, or for any other beneficial use, taking water from any natural stream, shall, within sixty days after the commencement of such construction, change of location, or enlargement, make a filing in the office of the state engineer for each specific claim, in such form as shall seem sufficient and satisfactory to the state engineer, and accompanied by the proper fees, as provided by statute, of a map, on tracing cloth or other material adapted for permanent record and preservation, made with permanent ink, showing the point of location of the headgate, the route of such ditch or canal, or the high water line of such reservoir or reservoirs, and the route of the feeder or feeders to, and ditches or canals from, such reservoir or reservoirs, the legal subdivisions of the land upon which such structures are built or to be built, if on surveyed lands, the names of the owners of such lands, and such courses, distances and corners by reference to legal subdivisions, if on surveyed lands, or to natural objects, if on unsurveyed lands, as will clearly designate the location of such structures.

[Laws 1911, S. B. No. 533, § 1.]

[For fees of state engineer see sections 3206, 3211 and 3332.]

3182. Statement attached to map.

SEC. 18. Upon or attached to such map shall be a statement showing, in the case of any ditch, canal or feeder:

First—The point of location of the headgate of the proposed structure;

Second—The depth, width, grade and length of each ditch, canal or feeder proposed;

Third—The carrying capacity of each ditch, canal or feeder in cubic feet per second;

Fourth—The time of commencement of work on such structures, which time may be the date of the commencement of the surveys therefor, or of the commencement of actual construction.

Fifth—The estimated cost of the project.

In the case of a filing on a reservoir site, the statement shall show the height of the proposed dam, the estimated cost, with the capacity in cubic feet and the surface area for each foot in depth of water stored up to and including the high water mark.

[Laws 1911, S. B. No. 533, § 2.]

[Cubic inch of water defined. Section 7026.]

3183. Statement in case of enlargement—Temporary map.

SEC. 19. In case of change, enlargement or extension, such statement shall show the matters required above, referring to the structure before such change or enlargement, and shall then state, also, the information required in the above items second, third, fourth and fifth, referring to the structure as enlarged, and in addition thereto, shall state definitely the increase in capacity to be added to the original capacity by virtue of such enlargement. Whenever, through the necessity for extended surveys requiring long periods of time, it shall be impracticable for the claimant or claimants to file a complete map and statement within sixty days, as required above, a map and statement as complete as can be prepared within sixty days shall be filed, with a further statement that a complete map and statement will be filed later, and upon the completion of such survey a full and detailed map and statement, amending those first filed, shall be offered for examination and acceptance in the same manner as herein provided for the original filing.

[Laws 1911, S. B. No. 533, § 3.]

3184. Statements must be signed and sworn to.

SEC. 20. Such statement shall be signed by the person or persons in whose behalf it is made, or in cases where an association or a corporation are the parties interested, the signature shall be the legal title of such association or corporation, signed by some duly authorized agent or officer, who shall sign his own name, giving his official title. The truth of the matters shown in the map and statement shall be sworn to by the engineer in charge, or person making the survey, before some officer legally qualified for the administration of oaths.

[Laws 1911, S. B. No. 533, § 4.]

3185. State engineer examine maps and statements—Return duplicate—Duplicate filed with recorder.

SEC. 21. The state engineer shall examine the map and statement, and if he shall find the data therein contained to be sufficient and satisfactory for a clear presentation of facts concerning the claims made, he shall endorse on each sheet of the filing "Accepted for filing in the office of the state engineer of Colorado on the.....day of.....," and attach thereto his signature and the seal of the state engineer's office. He shall then cause to be prepared a blue print, or other suitable reproduction, on cloth or other durable material adapted to the purpose, of each sheet of the filing, so endorsed, together with a negative print thereof and shall forward, said prints to the claimant who shall, within ninety days from the time stated as the date of commencement, file such blue print or reproduction in the office of the county clerk and recorder of the county in which the headgate of the proposed structure, or in which the proposed reservoir shall lie.

[Laws 1911, S. B. No. 533, § 5.]

3186. Certified copy evidence—Diligent construction.

SEC. 22. A certified copy of the map and statement thus filed in the state engineer's office shall be prima facie evidence in any court having jurisdiction of the intent of the claimant or claimants to make such construction and to utilize such rights as are shown and described in the map and statement; *Provided*, That nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects, or to the injury of those having rights prior to those of the claimants; *And, provided, further*, That nothing herein contained shall be so construed as to prevent a proper adjudication of rights in accordance with existing statutes governing such adjudication.

[Laws 1903, p. 291, § 6.]

3187. Compliance with former act.

SEC. 23. All plats and statements or other documents heretofore filed or recorded in substantial compliance with the provisions or requirements of section 2 of an act entitled, "An Act to provide for the extension of the right of way for ditches, canals and feeders of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged," approved February 11, 1881, shall be taken, deemed and held to constitute a compliance with the provisions of this act.

[Laws 1903, p. 292, § 7.]

[Section 2 of the act above referred to was held unconstitutional in *Lamar Co. v. Amity Co.*, 26 Colo., 370. The provisions of that section were re-enacted by L. '87, p. 315, which act was superseded by sections 3181-3187.]

DRAINAGE.

3188. Petition to establish or enlarge drain.

SEC. 24. Whenever any person, company or corporation desires the construction, enlargement or extension of a ditch, drain or water course for the purpose of draining and reclaiming seeped or marshy land, they shall file with the board of county commissioners of the county or counties in which such improvement or improvements are to be located, a petition signed by one or more of the land owners who own or represent the major portion of the land which would be affected by the proposed improvement.

[Laws 1903, p. 209, § 1.]

3189. Contents of petition—Plat.

SEC. 25. Said petition shall set forth the necessity for and probable benefits of such ditch, drain or water course, together with a list of the lands affected by the proposed improvement, and whether such lands so affected are in one or more counties, and therein naming the county or counties where such land is located, or through which said improvement may pass, and the names and addresses of the owners of such lands, and there shall be attached to said petition a plat showing approximately the location, direction, size and length of said drain, ditch or water course.

[Laws 1903, p. 210, § 2.]

3190. Bond of petitioner.

SEC. 26. The petitioner or petitioners shall give a good and sufficient bond, payable to the county or counties and approved by the county clerk, conditioned, in case said drain, ditch or water course from any cause whatsoever is not constructed, to pay all expenses incurred by the county or counties on account of said proposed improvements.

[Laws 1903, p. 210, § 3.]

3191. Board of viewers—Duties—Hearing—Notice.

SEC. 27. When such petition plat and bond are filed the board of county commissioners of each county where such improvement is to be made shall appoint a board of viewers consisting of three disinterested persons, residents of the county where the improvement is to be, who in turn shall select a competent engineer to assist them, and in the event that such improvement extends into more than one county when the board of commissioners of each county where such improvement is to be made shall take a like

action, and the same procedure shall be necessary of each county or board of county commissioners and of all petitioners or parties interested as would be necessary if the entire improvement were to be made in one county only. The board of viewers of each county wherein such improvement is to be made shall then proceed at once to view the line of the proposed drain and the lands affected thereby lying within the county for which they were appointed, and shall cause the engineer to prepare accurate surveys and estimates of the proposed work on the land lying within the county for which they were appointed, and shall set a day and place for hearing the views of all interested parties, receive protests, information, and any matter in relation to the proposed improvements; and the board of viewers shall notify all the resident land holders of their county affected by such improvement by personal service twenty days prior to the date of such meeting and personal service of said notice can not be had, or if any of said land holders are non-residents, then said notice shall be sent through the mail; and shall also cause to be published a copy of said notice in some weekly newspaper in said county for a period of not less than four weeks prior to said meeting.

[Laws 1903, p. 210, § 4.]

3192. Hearing—Evidence—Report—When joint hearing.

SEC. 28. All persons whose lands may be affected may appear at the time specified for the said meeting before said board of viewers and present such testimony and affidavits as shall relate to the proposed drainage system, with such recommendations and objections as shall to them seem pertinent and necessary. If the proposed improvement extends into more than one county then the viewers appointed by each board of county commissioners of the county wherein a part of such improvement is to be made, shall meet at some point agreed upon by the different boards of viewers of the different counties and there prepare a joint report upon all matters and things required of a board of viewers where the improvement is in a single county, and shall then forward to each board of county commissioners of each county for which they are appointed a copy of said joint report, but this shall not be construed so as to require the persons whose lands are affected thereby by this section to appear before said board when acting jointly unless it would be more convenient for hearing provided for by this section to be a joint one by the different reviewing boards of the different counties.

[Laws 1903, p. 211, § 5.]

3193. When improvement not feasible.

SEC. 29. If the viewers shall find that the proposed improvement is not feasible, they shall so report to the board of county commissioners, and the costs and expenses incurred shall be paid by the original petitioners, as provided under their bond.

[Laws 1903, p. 212, § 6.]

3194. When feasible—Report—Appeal.

SEC. 30. If, however, the improvements shall be found feasible and of use and benefit and to be desired by owners representing a major part of the lands affected, the board of viewers shall so report to the board of county commissioners, and shall include in their report a detailed recommendation of the method to be pursued in prosecuting the work, and shall submit plans and specifications for the letting of contracts and fix and recommend the proportionate assessment for each tract of land affected, which assessment shall be proportionate to the benefits accruing to each of such tracts; *Provided, however,* That any person interested therein who shall feel aggrieved at the report and finding of the board of county commissioners shall have the right of appeal to the district court of said county and have such matters passed upon by a jury.

[Laws 1903, p. 212, § 7.]

3195. Allotment of work—Bond.

SEC. 31. The board of viewers may, by agreement of the land owners, recommend the allotment to each of a portion of the improvement; *Provided, however,* That each said owner shall give a good and sufficient bond for the proper performance of his proportion of the work so allotted.

[Laws 1903, p. 212, § 8.]

3196. When work let by contract—Advertise for bids—Bond.

SEC. 32. In case no such allotment or division of the work is made, or in case all of it shall not be so allotted, the county commissioners shall cause an advertisement to be inserted in a daily or weekly paper of general circulation in the vicinity for a period of thirty days. Said advertisement shall be a notice to the land owners of the work proposed and shall call for bids on the work, in accordance with the recommendations of the board of viewers, and the contract shall be let to the lowest responsible bidder for the entire work lying within their respective counties,

or to the lowest responsible bidders on each of the several portions of the work. The successful bidder or bidders shall file a good and sufficient bond with the board of county commissioners for the faithful performance of their contract.

[Laws 1903, p. 212, § 9.]

3197. Completion—Expense pro rated—County treasurer collect.

SEC. 33. When the work shall have been completed and accepted by the engineer in charge, the county commissioners shall determine the total cost, damages and other expenses, and divide the same among the several tracts of land affected, in their respective counties, in the proportion determined by the board of viewers, and shall certify to the county assessor or assessors if in more than one county, a list of the lands affected, the total amounts to be assessed against each, with all credits for work or damages due the owner of each tract, with the net assessment of each, and the assessor or assessors if in more than one county shall enter the said net assessment against each of the several tracts of land lying within his county in the same manner as for other taxes, and the county treasurer of each county where such improvement or part thereof is to be made, shall collect the same and reimburse the county for all moneys expended or expenses incurred subject to the right of appeal to the district court as to matters herein as in cases of appeal from disallowance of claims by board of county commissioners.

[Laws 1903, p. 213, § 10.]

[For appeals from disallowance of claims by commissioners see section 1225.]

3198. Acceptance—Vouchers.

SEC. 34. Upon the proper acceptance by the engineer or engineers if such improvement is in more than one county the board of county commissioners of each county where such improvement is located, shall cause a voucher to be drawn upon the county treasurer for the amounts due on contracts, for damages and other expenses.

[Laws 1903, p. 213, § 11.]

3199. Compensation of engineers and viewers.

SEC. 35. Each of the members of the board of viewers shall receive their necessary expenses and three dollars per day for services, and the engineers shall receive their necessary expenses and six dollars per day for each day necessarily employed.

[Laws 1903, p. 213, § 12.]

3200. Right of eminent domain.

SEC. 36. The right of eminent domain shall extend to all improvements constructed under this act.

[Laws 1903, p. 213, § 13.]

[See Chapter 45. Eminent Domain.]

3201. Disposition of water drained.

SEC. 37. All waters gathered by such drainage improvement shall be the property of those from whose lands the same is taken by such drainage canal, and the same shall be pro rated among the different land holders from which such water is taken according to the cost of the improvement assessed against each one.

[Laws 1903, p. 213, § 14.]

RESERVOIRS.

3202. Reservoirs—Right to water—Right of way—Condemnation—Embankments over ten feet submit to county board.

SEC. 38. Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of lands for right of way for ditches; *Provided*, No reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated, and obtaining their approval of such plans.

[Laws 1879, p. 97, § 38.]

[Is the above section superseded by section 3205?]

3203. Conducting water in natural streams—Taking out—Allowance for seepage—How determined.

SEC. 39. The owners of any reservoir may conduct the water therefrom into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high water mark, and may take the same out again at any point desired, without regard to the prior rights of others to water from said stream; but due allowance shall be made for evaporation and seepage, the amount to be determined by the commissioners of irrigation of the district; or, if there are no such commissioners, then by the county

commissioners of the county in which the water shall be taken out for use.

[G. S., § 1725; Laws 1879, p. 107, § 39.]
[See also section 3225.]

3204. Liability of owners for damage.

SEC. 40. The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs.

[G. S., § 1726; Laws 1879, p. 107, § 40.]

3205. Construction of reservoirs—State engineer supervise.

SEC. 41. No reservoir of a capacity of more than seventy-five millions cubic feet of water, or having a dam or embankment in excess of ten feet in vertical height, and covering an area of more than 20 acres shall hereafter be constructed in this state, except the plans and specifications of the same shall first be approved by the state engineer; and the state engineer shall act as consulting engineer during the construction thereof, and shall have authority to require the material used and the work of construction to be done to his satisfaction; and no work shall be deemed complete under the provisions of this act until the state engineer shall give to the owners of such structures a written statement of the work of construction and the full completion thereof together with his acceptance of the same, which statement shall specify the dimensions and capacity of such reservoir or reservoirs.

[Laws 1899, p. 314, § 1.]

3206. Cost of inspection and supervision paid by owner.

SEC. 42. The owners of such reservoirs shall pay to said state engineer his actual expenses incurred in making personal inspection, and five dollars per day and expenses to any deputy appointed by him to attend to such supervision when necessarily employed for such purpose.

[Laws 1899, p. 314, § 2.]

3207. Engineer determine amount of water to be stored.

SEC. 43. The state engineer shall annually determine the amount of water which it is safe to impound in the several reservoirs within this state and it shall be unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe.

[Laws 1899, p. 315, § 3.]

3208. Water commissioner withdraw excess water—Close inlets.

SEC. 44. In the event of the owners of any such reservoir impounding water therein to a depth greater than that determined by the state engineer to be safe, it shall be the duty of the water commissioner of the district wherein such reservoir shall be located, to forthwith proceed to withdraw from said reservoir so much of the water so impounded therein as shall be in excess of the amount so determined by the state engineer to be safe, and shall close the inlets to the same so as to prevent said reservoir from being refilled to an amount beyond what said state engineer shall have designated as being safe. In the event of the owners of said reservoir, or any other person or persons, interfering with the water commissioner in the discharge of said duty, the said water commissioner shall call to his aid such persons as he deems necessary, and employ such force as the circumstances demand to enable him to comply with the requirements of this section.

[Laws 1899, p. 314, § 4.]

3209. Complaint that reservoir is unsafe—Duty of engineer.

SEC. 45. Upon complaint being made to the state engineer by three or more persons residing or having property in such a location that their homes or property would be in danger of destruction or damage in the event of a flood occurring on account of the breaking of the embankment of any reservoir within the state, that said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the duty of the state engineer to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If upon such examination, the state engineer shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall be his duty to immediately cause said water to be drawn off from said reservoir, to such an extent as will, in his judgment, render the same safe. If water is then flowing into said reservoir, he shall cause the same to be discontinued.

[Laws 1899, p. 315, § 5.]

3210. Engineer may use force—Violation of engineer's order.

SEC. 46. The state engineer is hereby authorized and empowered to use such force as is necessary to perform the duties required of him in the preceding section, and to have and exercise all of the powers conferred upon the water commissioner by section

4 of this act. If, after any of such reservoirs shall have been examined by said state engineer, the owners thereof, or any other person or persons, shall fill or attempt to fill them, or either of them to a point in excess of the amount the state engineer shall have determined to be safe, then it shall be the duty of the water commissioner of the district wherein such reservoir is located to proceed as is directed by section 4 of this act.

[Laws 1899, p. 316, § 6.]

[Section 4 above referred to is section 3208.]

3211. Expense of examination—By whom paid.

SEC. 47. The persons calling upon the state engineer to perform the duty required of him by section 5 hereof shall pay him mileage in advance at the rate of ten cents per mile for each mile actually and necessarily traveled in going to and from said reservoir, and should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination.

[Laws 1899, p. 316, § 7.]

[Section 5 above referred to is section 3209.]

3212. Appeal from decision of engineer.

SEC. 48. In the event of either party being dissatisfied with the decision of the state engineer, they may take an appeal to the county, or district court of the county wherein said reservoir is located, and said court shall hear and determine the matter summarily at the earliest practical time without written pleadings or the aid of a jury; subject to the right of either party to take an appeal or writ of error as in other civil cases; *Provided*, That the judgment of the state engineer shall control until final determination of the cause.

[Laws 1899, p. 316, § 8.]

3213. Owners liable for damages in case of breakage of reservoir.

SEC. 49. None of the provisions of this act shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breaking of the embankments thereof, but in the event of any such reservoir overflowing, or the embankments, dams or outlets breaking or washing out, the owners thereof shall be liable for all damage occasioned thereby.

[Laws 1899, p. 316, § 9.]

3214. Violation of act—Penalty—Disposition of fines.

SEC. 50. Any reservoir company failing or refusing, after ten day's notice in writing having been given, to obey the direc-

tions of the state engineer as to the construction or filling of any reservoir as herein provided, shall be subject to a fine of not less than fifty dollars, for each offense, and each day's continuance after time of notice has expired shall be considered a separate offense; such fines to be recovered by civil action in the name of the people, by the district attorney, upon the complaint of the state engineer, and in the county where the injury complained of occurred, the proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county.

[Laws 1899, p. 317, § 10.]

3215. Survey of reservoir site on arid land.

SEC. 51. It shall be the duty of the county surveyor of each county within this state upon the request of the owner of ten or more acres of arid land lying in such county, to locate and survey an available site for a reservoir upon such land, such reservoir to be used for the storage of water to irrigate the land contiguous thereto and such reservoir to be of a capacity to hold sufficient water to properly irrigate not less than ten acres of such land.

[Laws 1903, p. 262, § 1.]

3216. Construction of reservoir—County surveyor supervise.

SEC. 52. Within thirty (30) days after such location and survey by the county surveyor, the owner of such land shall begin the construction of such reservoir and shall work continuously thereon until the completion thereof and all of such work of construction and the construction of such dam or dams as may be necessary, and the construction of the outlet to such reservoir shall be done under the direction and supervision of such county surveyor.

[Laws 1903, p. 262, § 2.]

3217. Completion—Plat filed—Contents.

SEC. 53. Upon the completion of the reservoir it shall be the duty of the county surveyor to file with the board of county commissioners of such county, a map or plat of the land upon which such reservoir is located; describing such land by legal subdivisions and showing thereon the name of the owner, the number of acres of arid land contiguous to such reservoir claimed by such owner; the size of water capacity in cubic feet of such reservoir; the number of acres of land capable of being irrigated by such reservoir;

the source and means of supplying such reservoir with water, and indicating the point of location upon the land of such reservoir.

[Laws 1903, p. 263, § 3.]

3218. Approval of plat—Duty of owner.

SEC. 54. It shall be the duty of such board of county commissioners to, within sixty (60) days after the filing of such map or plat, to approve the same by resolution spread upon the records of such board. That it shall be the duty of such owner or his tenant, to use such reservoir and keep the same in good repair and in a safe condition.

[Laws 1903, p. 263, § 4.]

3219. Inspection—Notice to owner—Failure to repair.

SEC. 55. It shall be the duty of the county surveyor to annually inspect each reservoir within his county so constructed under the provisions of this act, and he shall file with the board of county commissioners a report in writing showing the condition of such reservoir and a statement as to whether or not such reservoir was being used during the year of such inspection for the purposes contemplated by this act; and should he find any such reservoir, or dam or outlet thereof, in an unsafe and dangerous condition he shall in writing so notify the owner or tenant thereof as provided in section three hereof; and should such owner or his tenant fail or refuse within the aforesaid period of thirty (30) days to place such reservoir, dam and outlet in a safe and proper condition, then and in that event it shall be the duty of the said county surveyor to immediately let out and release under his direct supervision any and all waters that may have accumulated in such reservoir; and the said county surveyor shall within ten (10) days thereafter file with the board of county commissioners a report in writing of his acts in the premises.

[Laws 1903, p. 263, § 5.]

[Section 3 above referred to is section 3217.]

3220. Compensation of county surveyor—By whom paid.

SEC. 56. The county surveyor shall be paid for his services at the time of making such survey and location, the sum of ten (10) dollars and all the necessary traveling expenses, and upon the completion of such reservoir and the filing of the map or plat specified in section 3 hereof he shall be paid the further sum of five (5) dollars and all necessary traveling expenses and superintending the construction of such reservoir, dam and outlet, and such payments and traveling expenses shall be borne by said owner

or tenant of such reservoir and land; and for annually inspecting and filing his report of the condition of such reservoir within his county as specified in section 4 hereof, the county surveyor shall be paid the sum of five (5) dollars for each of such reservoirs so inspected and so reported upon, out of the general fund of such county.

[Laws 1903, p. 264, § 6.]

[Sections 3 and 4 above referred to are sections 3217 and 3218.]

EXCHANGE OF WATER—CHANGING POINT OF DIVERSION.

3221. Damages.

SEC. 57. County surveyors and members of boards of county commissioners within this state shall not be liable in damages for any act done by them in pursuance of the provisions of this act.

[Laws 1903, p. 264, § 7.]

3222. Exchange of water, less seepage.

SEC. 58. That whenever any person or company shall divert water from one public stream and turn it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer.

[Laws 1897, p. 176, § 1.]

[See also section 3232.]

3223. Must maintain flumes and register water.

SEC. 59. Any person or company transferring water from one public stream to another shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another, and also at the point where it is finally diverted for use from the public stream.

[Laws 1897, p. 176, § 2.]

[See also section 3249.]

[Failure to maintain 3249.]

3224. Water commissioner keep record.

SEC. 60. It shall be the duty of the water commissioner of the district in which the water is used to keep a record of the amount of water so turned into his district from any other district.

[Laws 1897, p. 176, § 3.]

3225. Reservoirs and ditches may exchange.

SEC. 61. When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored

water into a ditch entitled to water or into the public stream to supply appropriations from said stream, and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer; *Provided*, That the person or company desiring such exchange shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the water commissioner may readily determine and secure the just and equitable change of water as herein provided.

[Laws 1897, p. 176, § 4.]
[See also section 3202.]

3226. Changing point of diversion—Petition—Practice and procedure.

SEC. 62. Every person, association or corporation desirous of changing in whole or in part the point or points of diversion of his or its right to use water from any of the streams of the state, shall present a petition to the district court from which the original decree issued, whether the change be from one district to another or not; praying that such change be granted. The practice and procedure upon all petitions, save as herein provided, shall be the same as if the petition were for an original statutory decree; and if the change be from one district to another, the court in which the petition is filed shall require notice and service in each district intervening between the original and the new points of diversion in the manner as now provided by law for statutory water adjudications in said several districts, save that all process or notice shall be issued from and returnable to the court in which the petition is filed as aforesaid.

[Laws 1903, p. 278, § 1.]

3227. Notice to parties affected—When change allowed.

SEC. 63. The court shall require proof that all parties who may be affected by the change have been duly notified in the proceeding, as in the case of an original adjudication, and shall hear evidence to determine whether such change will injuriously affect the vested rights of others in and to the use of water, and a decree shall be entered permitting the change as prayed for, unless it appear that such change will injuriously affect the vested rights of others; and if such injury appear, the court shall decree the change

only upon such terms and conditions as may be necessary to prevent such injurious effect, or to protect the parties affected or if impossible so to do, may deny said application.

[Laws 1903, p. 278, § 2.]

[No further publication required in proceedings after decree entered. Section 3289.]

3228. Several applications in one—Consolidation—Process.

SEC. 64. Applications to change two or more points of diversion to the same common point may be embraced in one petition, or if separately made in the same court, may be consolidated; and petitions separately filed in the same court for changes to several points may be consolidated by the court or judge for notice, hearing or otherwise, if it appear practicable so to do; and the court or judge shall have power to extend the time for service, notice and appearance, and to make all necessary or expedient rules in the proceeding as in the case of a statutory water adjudication.

[Laws 1903, p. 279, § 3.]

3229. Certified copy of decree filed—Notice of change.

SEC. 65. Upon the granting of a decree of change, the petitioner desirous of making the change, shall cause to be prepared certified copies of the decree, and shall cause filings thereof to be made with the county clerk of the county in which the original point of diversion is located, and with the county clerk of the county in which the new point of diversion is, or is to be located, and also in the office of the state engineer. Thereupon the change decreed shall be recognized in the distribution of water, the priority rights being allotted according to the terms of the said decree, and the state engineer shall immediately issue notices to that effect to the water commissioners in the water district or districts affected, and to the division superintendent or superintendents in said divisions.

[Laws 1903, p. 279, § 4.]

[Office of division superintendent abolished and division engineers provided in their place. Section 3335.]

3230. Change to other district—Copy of decree filed.

SEC. 66. In case a change be decreed from one district to another, the petitioner shall file a certified copy of the decree of change in the court having jurisdiction of the statutory water adjudication in the district of the new point of diversion, and thereupon, on motion, the court in which the copy is so filed, shall order a record of the decree of change, and the original decree

therefore entered in said court shall accordingly stand modified as to the matters contained in the said decree of change.

[Laws 1903, p. 279, § 5.]

3231. Re-arguments, reviews and appeals.

SEC. 67. Re-arguments and reviews of and appeals from decrees entered hereunder may be had as in the case of a statutory water adjudication; *Provided, however,* They be prayed within thirty days from the time of entering the decree complained of.

[Laws 1903, p. 280, § 6.]

[Sections 3226-3231 supersede sections 1 and 2, p. 235, L. '99, of which act section 3232 was section 3.]

3232. Owner may exchange or loan water right.

SEC. 68. It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; *Provided,* That the owner or owners making such loan or exchange, shall give notice in writing signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water.

[Laws 1899, p. 236, § 2.]

II. DUTIES OF OWNERS.

Section.

- 3233. Owners shall maintain embankments—Tail ditch.
- 3234. Vested rights not impaired.
- 3235. Owner of ditch crossing highway must maintain bridge.
- 3236. Ditch must be bridged in three days—Duty of supervisor.
- 3237. Proceedings against owner for payment—Damages.
- 3238. Owner of ditch must prevent waste.
- 3239. Running excess of water forbidden.
- 3240. Penalty for violation of this act.
- 3241. When ditches in cities must be covered.
- 3242. Head of ditch to be latticed.
- 3243. Penalty for failure to cover and lattice.
- 3244. Owner maintain headgate—Size of timbers.
- 3245. Same—Liability of owner for neglect or refusal.
- 3246. Owner maintain headgates and wastegates—Effect of failure.
- 3247. Provide locks for headgate—Effect of failure.
- 3248. Ditch owner maintain headgates and weirs.
- 3249. Owners of ditch or reservoir transferring water must maintain headgate and weirs—Effect of failure.
- 3250. Rating tables furnished commissioners.
- 3251. When water not to be stored in reservoirs—Gauge rods.
- 3252. Control of headgates and measuring weirs.
- 3253. Survey of reservoirs—Report—Gauge rods—Failure to comply.
- 3254. Ditch owners provide flow on demand of users.
- 3255. Ditches to be kept in repair—Outlets.
- 3256. Measurement of water.
- 3257. Penalty for refusal or neglect to deliver water.
- 3258. Water commissioner measure water—Failure.
- 3259. Jurisdiction of justice of the peace.
- 3260. No person to receive more water than he is entitled to.
- 3261. Duty of party receiving more water than he is entitled to.

3233. Owner shall maintain embankments—Tail ditch.

Sec. 69. The owner or owners of any ditch for irrigation or other purposes, shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return

[For liability of co-owners in caring for ditch and their lien for expense see sections 4051-4060.]

[Ditch companies must keep their ditch in repair. Section 993.]

the water in such ditch with as little waste as possible into the stream from which it was taken.

[G. L. § 1378.]

[The above section is taken from G. S., '83, which gives its origin as L. '72, p. 144, section 1 and L. '76, p. 78, section 2.]

3234. Vested rights not impaired.

SEC. 70. Nothing in this chapter contained shall be so construed as to impair the prior vested rights of any mill or ditch owner or other person to use the waters of any such water course.

[G. S. § 1729; G. L. § 1378.]

3235. Owner of ditch crossing highway must maintain bridge.

SEC. 71. Any ditch company constructing a ditch, or any individual having ditches for irrigation, or for other purposes, wherever the same be taken across any public highway or public traveled road, shall put a good substantial bridge, not less than fourteen feet in breadth, over such watercourse where it crosses said road.

[G. S., § 1730; G. L., § 1381; R. S., p. 364, § 10.]

3236. Ditch must be bridged in three days—Duty of supervisor.

SEC. 72. When any such ditch or watercourse shall be constructed across any public traveled road, and not bridged within three days thereafter, it shall be the duty of the supervisor of the road district to put a bridge over said ditch or watercourse, of the dimensions specified in section ten of this chapter, and call on the owner or owners of the ditch to pay the expenses of constructing such bridge.

[G. S., § 1731; G. L., § 1382; R. S., p. 364, § 11.]

[Section 10 referred to in last above section is section 3235.]

[Penalty for owner failing to place bridge over ditch, section 5829.]

3237. Proceedings against owner for payment—Damages.

SEC. 73. If the owner or owners of such ditch refuse to pay the bill of expenses so presented, the supervisor may go before any justice of the peace in the township or precinct, and make oath to the correctness of the bill, and that the owner or owners of the ditch refuse payment; and thereupon such justice of the peace shall issue a summons against such owner or owners, requiring him or them to appear and answer to the complaint of such supervisor in an action of debt for the amount sworn to be due, such summons to be made returnable and served, and proceedings to

be had thereon as in other cases; and in case judgment shall be given against such owner or owners, the justice shall assess, in addition to the amount sworn to be due as aforesaid, the sum of ten dollars, as damages arising from the delay of such owner or owners, such judgment to be collected as in other cases, and to be a fund in the hands of the supervisor of roads, for the repairs of roads in such precinct or district.

[G. S. § 1732; G. L., § 1383, R. S., p. 365, § 12.]

3238. Owner of ditch must prevent waste.

SEC. 74. The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting.

[Laws 1876, p. 78, § 1.]
[See also section 3233.]

3239. Running excess of water forbidden.

SEC. 75. During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water.

[Laws 1876, p. 78, § 2.]

3240. Penalty for violation of this act.

SEC. 76. Any person who shall wilfully violate any of the provisions of this act shall, on conviction thereof before any court having competent jurisdiction, be fined in a sum of not less than one hundred (100) dollars. Suits for penalties under this act shall be brought in the name of the people of the state of Colorado.

[G. S., § 1735; G. L., § 1387; Laws 1876, p. 78, § 3.]
[The Act above referred to embraces sections 3238-3240.]

3241. When ditches in cities must be covered.

SEC. 77. That every corporation and company, whether created by special act, or organized under the general incorporation laws of this state, and every partnership, person or persons who now, or may at any time hereafter, own or control any canal or ditch, or any part thereof, being two feet in width or over, and carrying water to the depth of twelve inches or over, which canal or ditch, or any part thereof, is within the corporate limits of any city denominated in the law as of the first class, or any city exist-

ing by special charter of a population equal to or exceeding said cities of the first class, or any of the additions thereto, shall, at their own expense, within sixty days after this act shall have taken effect, confine, flume, and cover over, all or any part of such canal or ditch, whether located on or across private property, public highways or alleys in said city or additions thereto, in a reasonable and sufficient manner, and with such materials as will render such fluming or covering safe and a sure protection to the lives and property of the inhabitants of said city; and any such corporation, company, partnership, person or persons, shall at all times thereafter keep and maintain any and all such structures, confining, fluming and covering of such canal or ditch in good order and repair, at their own expense.

[Laws 1887, p. 65, § 1.]

[Cities of the first class embrace those with a population over 15,000, section 6532.]

3242. Head of ditch to be latticed.

SEC. 78. Such corporation, company, partnership, person or persons, shall, at their own expense, safely and securely lattice or slat the head of such flume or covering with proper materials, so that persons or animals cannot accidentally enter such flume or covering at the head thereof, and pass or be carried down the current of said canal or ditch, and shall thereafter maintain and keep the same in good order and repair, at their own cost and expense.

[Laws 1887, p. 65, § 2.]

3243. Penalty for failure to cover and lattice.

SEC. 79. If any such corporation, company, partnership, person or persons, shall fail or refuse to comply with any of the provisions of the two preceding sections, such corporation, company, partnership, person or persons, shall forfeit and pay to the county, for the use of the common school fund, the sum of fifty dollars for each and every day such failure or refusal shall continue; to be recovered by a civil action in the name of the people of the state of Colorado, in any court of competent jurisdiction; *Provided*, That nothing in this act shall be construed to bar an action for special damages by any person who shall have suffered such damages by reason of any failure to comply with any of the provisions of this act.

[Laws 1887, p. 65, § 3.]

3244. Owner maintain headgate—Size of timbers.

SEC. 80. That the owner or owners of every irrigating ditch, flume or canal, in this state, shall be required to erect and keep

in good repair a headgate at the head of their ditch, flume or canal. Such headgate, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such headgate shall be constructed of timber not less than four inches square, and the bottom, sides, and gate or gates, shall be of plank, not less than two inches in thickness.

[Laws 1881, p. 165, § 1.]
[See also section 3248.]

3245. Same—Liability of owner for neglect or refusal.

SEC. 81. Owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of section one of this act.

[G. S., § 1736; Laws 1881, p. 165, § 1.]
[Section 1 above referred to is section 3244.]

3246. Owner maintain headgates and wastegates—Effect of failure.

SEC. 82. All persons, associations or corporations who have heretofore or who may hereafter divert water for purposes of irrigation from any of the public streams of the state, shall erect and maintain headgates and wastegates in connection therewith, and in case of failure or neglect, or refusal to do so, after five days notice has been given by the water commissioner or state engineer, then said headgates shall be constructed by the water commissioner of the district within which said ditch, canal or conduit may be located, and if, upon demand, the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, then the said water commissioner shall take such proceedings to recover the same as is now provided for by sections seventeen hundred and thirty, seventeen hundred and thirty-one and seventeen hundred and thirty-two of the general statutes of 1883, in the case of failure to build and maintain bridges.

[Laws 1889, p. 161, § 1.]
[G. S. sections 1730, 1731 and 1732 above referred to are sections 3235, 3236 and 3237 respectively.]

3247. Provide locks for headgate—Effect of failure.

SEC. 83. All persons, associations or corporations shall put and keep suitable locks and fastenings on their headgates, where water is conducted from the public streams or heads of supply, and if said persons, associations or corporations refuse or neglect to provide locks and suitable fastenings for said headgates, after five

days' notice by the water commissioner of the district, or by the state engineer, it is made the duty of the water commissioner of the water district, and its superintendent, to provide suitable locks and fastenings, and if the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, the water commissioner shall take such proceedings to recover the same as are provided in section one of this act; the keys of said locks to be under the control and in possession of the water commissioner of the district during the season of irrigation or domestic distribution of water.

[Laws 1889, p. 161, § 2.]

[Section 1 above referred to is section 3246.]

3248. Ditch owner maintain headgates and weirs.

SEC. 84. The owner or owners of any irrigation ditch, canal, flume or reservoir in this state, taking water from any stream, shall erect and maintain in good repair, at the point of intake of such ditch, canal, flume or reservoir, suitable and proper headgate or bendgate of height and strength and with embankments sufficient to control the water at all ordinary stages and suitable and proper measuring flume, weirs and devices, and shall also erect and maintain in good repair suitable wastegates in connection with such ditch, canal, flume, or reservoir intake. The framework of such headgate shall be constructed of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness, or said gate may be made of other material of equal strength and durability, or may be made and constructed upon plans and specifications approved by the state engineer. No such headgate shall be deemed complete until provided with suitable lock or locks and fastenings therefor and keys thereof delivered to the water commissioner of the district, who shall have control thereof during the seasons of the distribution of water. If the owner or owners of any such irrigation ditch, canal, flume or reservoir, shall fail or neglect to erect or maintain in good repair, said headgate, measuring flume, weir or devices, in the manner and form herein provided, then the state engineer, division engineer, or water commissioner, upon ten days' previous notice in writing, duly served upon such owner or owners, or upon any agent or employe representing it to them or controlling such ditch, canal, flume or reservoir, shall refuse to deliver any water from such stream to such owner or owners, or to such ditch, canal, flume or reservoir, until such owner or owners shall cause to be erected or repaired the headgate, measuring flume, weirs or devices of such ditch, canal, flume or reservoir.

The owner or owners of all such ditches, canals, flumes or reservoirs shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of this act, and any such owner or owners who shall divert water from any such stream and into any such ditch, canal, flume or reservoir contrary to the orders of the state engineer, division engineer, or water commissioner, as herein provided, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not to exceed five hundred dollars, and each day of violation shall be deemed a separate offense.

[Laws 1911, S. B. No. 134, § 1.]

[See also section 3244.]

[Office of superintendent of irrigation abolished and division engineers provided in their place. See section 3335.]

3249. Owner of ditch or reservoir transferring water must maintain headgate and weirs—Effect of failure.

SEC. 85. The owner or owners of any irrigation ditch, canal or reservoir, transferring water from one natural stream to another, or from a reservoir, ditch or flume to a stream in order that said water may be diverted from such stream for irrigation or any other purpose, shall construct suitable and proper measuring flumes or weirs, equipped with self registering devices, if required by the state engineer, for the proper and accurate determination of the amount and flow of water turned into, carried through and diverted out of said natural stream. If the owner or owners of any such irrigation ditch, canal or reservoir, shall fail or neglect, upon five days previous notice in writing duly served upon him or them, or his or their agent or employee, to erect, maintain or repair such measuring flume, weir or device, the state engineer or division engineer shall refuse to allow to be taken or diverted from any stream any water whatever on account of delivery of water to such stream, for such time and until such owner or owners shall cause to be erected or repair such flumes, weirs or devices, at the point of delivery to and taking from said natural streams so used as a conduit.

[Laws 1911, S. B. No. 134, § 2.]

[See also section 3223.]

[See note, section 3248 as to superintendent of irrigation.]

3250. Rating tables furnished commissioners.

SEC. 86. The state engineer or division engineer shall rate the measuring flumes and weirs referred to in this act, and the original notes of such rating, together with a complete table compiled therefrom, shall be filed as a part of the records of the office

of the state engineer, and the state engineer shall supply the division engineer of the division and the water commissioner of the district in which such measuring flumes or weirs are located, with a copy of such rating table, which shall be used by them in measuring water flowing to and from such natural stream.

[Laws 1911, S. B. No. 134, § 3.]

[Sections 1 and 2 above referred to are sections 3248 and 3249.]

[See note, section 3248 as to superintendent of irrigation.]

3251. When water not to be stored in reservoirs—Gauge rod.

SEC. 87. The owners or possessors of reservoirs shall not have the right to impound any water in such reservoirs during the time that such water is required in senior ditches for immediate use for direct irrigation or for storage in reservoirs holding senior rights. A gauge rod, marked in feet and tenths and one-hundredths of a foot, shall be permanently fixed and maintained at the outlets of all reservoirs, under the supervision of the state engineer, and if any owner or possessor of any reservoir shall fail or refuse within thirty days after this act goes into effect, to provide, fix and maintain such gauge rod or rods, as aforesaid, then and in that event the owner or possessor of such reservoir shall not be entitled to impound any water whatever in said reservoir or reservoirs until the provisions of this section are fully complied with.

[Laws 1911, S. B. No. 134, § 4.]

3252. Control of headgates and measuring weirs.

SEC. 88. All headgates, measuring weirs, flumes and devices used in connection with canals, flumes, ditches or reservoirs for the measuring and delivery of water therefrom and thereto, shall be under the supervision and control at all times of the state engineer, the division engineer of the water division and the water commissioner of the water district wherein such headgates, measuring weirs, flumes and devices are located.

[Laws 1911, S. B. No. 134, § 5.]

3253. Survey of reservoirs—Report—Gauge rods—Failure to comply.

SEC. 89. The owner or owners of any reservoir situate upon or in the bed of any natural stream or through which any natural stream flows, for the purpose of storing or diverting water, shall, at the expense of the owner or owners, cause a complete survey of the contour lines of said reservoir to be made, which said survey may be approved by the state engineer, or, in the discretion

of the state engineer, shall be made under the supervision of the state engineer, or his deputy or the division engineer of the division in which such reservoir is located. Said contour lines shall be ascertained for at least every vertical foot in depth, and, in all cases where deemed necessary by the state engineer, for fractions of a foot. There shall be prepared a table to be filed in triplicate with, and approved by the state engineer, showing the capacity of said reservoir, in cubic feet, for each foot in depth or fraction thereof, one copy of which said table shall be furnished to the division engineer and one copy to the water commissioner in whose district such reservoir is situate. All maps, plats, field notes and the table of such reservoir, survey and capacity, shall be filed with and approved by the state engineer, and remain a part of the records of his office. The owner or owners of such reservoir shall, at their own expense, under the supervision and with the approval of the state engineer, permanently fix and maintain a gauge rod at or near the outlet of such reservoir, marked in feet and tenths and one-hundredths of a foot, and in correspondence with the contour lines, from and by means of which the amount of water stored in, or taken from, said reservoir may be correctly ascertained, and shall, at the expense of such owner or owners and under the supervision and with the approval of the state engineer, construct and permanently maintain a suitable and permanent measuring weir or flume equipped with self registering devices, according to plans and specifications approved by the state engineer, in the bed and channel of every natural stream or water course discharging waters into said reservoir by means of which all of the water flowing into said reservoir from and through each such stream or water course, may at all times be definitely ascertained and determined. Such gauge rods, flumes or weirs, and devices, shall be at all times subject and open to inspection by the owner or duly authorized agent or representative of the owner or owners of any appropriation of water from the stream upon or in which such reservoir is constructed or operated.

Upon the failure or neglect of the owner or owners of any such reservoir to construct or permanently maintain such gauge rods, measuring flumes or weirs, equipped as herein provided; or upon failure or neglect of such owner or owners to cause complete survey of the contour lines of said reservoir to be made, after thirty days notice in writing, directing such contour survey to be made, duly served upon such owner or owners, or their agent or employee, by the state engineer or division engineer, the state engineer or division engineer shall refuse to allow any water whatsoever to be taken into or diverted from or by means of said reservoir; *Pro-*

vided, however, That when suitable weirs, flumes, gauge rods and measuring devices have been installed and equipped, as herein provided, the state engineer and division engineer may allow water to be stored in any such reservoir or reservoirs after thirty days having expired after the giving of said notice, in the event that the survey of said contour lines is then being prosecuted in good faith.

Upon complaint in any manner made to the state engineer or the division engineer by the owner or owners of any appropriation of water, from any stream upon which any such reservoir is located, or any stream of which such stream is a tributary, charging a violation of any of the requirements of this section, the state engineer or division engineer shall thereupon forthwith inquire into the truth of such complaint, and if the charges are found to be true, shall enforce the provisions and penalties of this section.

[Laws 1911, S. B. No. 134, § 6.]

3254. Ditch owners provide flow on demand of users.

SEC. 90. Every person or company owning or controlling any canal or ditch used for the purposes of irrigation and carrying water for pay, shall, when demanded by the users during the time from April 1, until November 1, in each year, keep a flow of water therein, so far as may be reasonably practicable for the purpose of irrigation, sufficient to meet the requirements of all such persons as are properly entitled to the use of water therefrom, to the extent, if necessary, to which such person may be entitled to water, and no more; *Provided, however,* That whenever the rivers, or public streams or sources from which the water is obtained are not sufficiently free from ice, or the volume of water therein is too low and inadequate for that purpose, then such canal or ditch shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priorities from the streams or other sources, as provided by law, and the necessity of cleaning, repairing and maintaining the same in good condition.

[Laws 1893, p. 299, § 1.]

3255. Ditches to be kept in repair—Outlets.

SEC. 91. The owners, or persons in control, of any canal or ditch used for irrigating purposes, shall maintain the same in good order and repair, ready to receive water by April 15, in each year, so far as can be accomplished by the exercise of reasonable care and diligence, and shall construct the necessary outlets in the

banks of the canal or ditch for a proper delivery of the water to persons having paid up shares, or who have rights to the use of water; *Provided, however*, That a multiplicity of outlets in the canal or ditch shall at all times be avoided, so far as the same shall be reasonably practicable, and the location of the same shall be under the control of, and shall be at the most convenient and practicable points consistent with the protection and safety of the ditch for the distribution of water among the various claimants thereof; and such location shall be under the control of a superintendent.

[Laws 1887, p. 305, § 2.]
[See also section 993.]

3256. Measurement of water.

SEC. 92. It shall be the duty of those owning or controlling such canals or ditches, to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlets, to those entitled thereto according to his or her pro rata share.

[Laws 1887, p. 305, § 3.]

3257. Penalty for refusal or neglect to deliver water.

SEC. 93. Any superintendent, or any person having charge of the said ditch, who shall wilfully neglect or refuse to deliver water, as in this act provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense, or imprisonment not exceeding one month, or by both such fine and imprisonment; and the money thus collected shall be paid into the general fund of the county in which the misdemeanor has been committed; and the owner or owners of such ditches shall be liable in damages to the person or persons deprived of the use of the water to which they were entitled as in this act provided.

[Laws 1887, p. 305, § 4.]

3258. Water commissioner measure water—Failure.

SEC. 94. Any water commissioner, or his deputy, or assistant, who shall wilfully neglect or refuse, after being called upon in accordance with section 1758 of the General Statutes of the state, to promptly measure water from the stream, or other source of supply, into the irrigating canals or ditches, in his district, according to their respective priorities, to the extent to which water may

be actually necessary for the irrigation of lands under such canals or ditches, shall be deemed guilty of a misdemeanor, and shall be subject to the same penalty as provided in section 4 of this act.

[Laws 1887, p. 305, § 5.]

[G. S., section 1758 above referred to is section 3430.]

[Section 4 above referred to is section 3257.]

3259. Jurisdiction of justice of the peace.

SEC. 95. In all cases declared misdemeanors by this act, any justice of the peace of the county in which the offense was committed, may, upon complaint being made, as is now required by law, issue a warrant directed to any proper officer of the county for the arrest of any person so charged with any misdemeanor, and upon arrest of such person or persons, the justice of the peace before whom such person or persons may be brought for trial, shall hear and determine the cause and, if he find the accused guilty, shall assess the fine, and if imprisonment be a portion of the sentence, then to fix the term of imprisonment, or both, as provided in section 4 of this act; *Provided*, The accused may have a trial by jury which shall be summoned as in cases before justices of the peace for assault and battery.

[Laws 1887, p. 306, § 6.]

[For summoning jury see section 3863.]

[Section 4 above referred to is section 3257.]

3260. No person to receive more water than he is entitled to.

SEC. 96. That it shall be the duty of every person, who is entitled to take water for irrigation purposes from any ditch, canal, or reservoir, to see that he receives no more water from such ditch, canal or reservoir through his headgate, or by any ways or means whatsoever, than he is entitled to, and that he shall, at all times, take every precaution to prevent more water than he is entitled to, coming from such ditch, canal, or reservoir, upon his land.

[Laws 1887, p. 312, § 1.]

3261. Duty of party receiving more water than he is entitled to.

SEC. 97. That it shall be the duty of every such person, taking water from any ditch, canal, or reservoir, to be used for irrigation purposes, on finding that he is receiving more water from such ditch, canal or reservoir, either through his headgate, or by means of leaks, or by any means whatsoever, immediately to take steps to prevent his further receiving more water from such ditch, canal or reservoir, than he is entitled to, and if knowingly he permits such extra water to come upon his land, from such ditch,

canal or reservoir, and does not immediately notify the owner or owners of such ditch, or take steps to prevent its further flowing upon his land, he shall be liable to any person, company or corporation, who may be injured by such extra appropriation of water, for the actual damage sustained by the party aggrieved; which damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court and taxed with the costs.

[Laws 1887, p. 312, § 2.]

III. RATE OF CHARGE FOR WATER.

Section.

- 3262. Regulating charges—Petition—Affidavits—Proceedings before commissioners.
 - 3263. Powers and duties of commissioners—Hearing—Order—Existing contracts.
 - 3264. Right to continue purchasing water—Stockholders—Rights.
 - 3265. County commissioners hear and consider applications.
 - 3266. Commissioners appoint day for hearing parties interested.
 - 3267. Hearing—Order fixing date of hearing—Service of order.
 - 3268. Hearing—Testimony—Commissioners fix maximum rate.
 - 3269. False swearing.
 - 3270. Repeal.
 - 3271. Bonus deemed an extortionate rate—Recovery.
 - 3272. Penalty for collecting excessive rate.
 - 3273. Penalty for refusal to deliver water.
 - 3274. Action when corporation refuses to deliver water.
 - 3275. "Person" defined—Liability.
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3262. Regulating charges—Petition—Affidavits—Proceedings before commissioners.

Sec. 98. The county commissioners of each county shall, at their regular January session in each year, hear and consider any and all applications which may be made to them by any party or parties interested in procuring water for irrigation by purchase from any ditch or reservoir furnishing and selling water, or proposing to furnish water for sale, the whole or upper part of which shall lie in such county, which application shall be supported by such affidavit or affidavits as the applicant may see proper to present, showing reasonable cause for such board to proceed to fix the price of water to be thereafter sold from such ditch or reservoir, and if such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, find that the facts sworn to show the application to be in good faith, and that there is reasonable grounds to believe that unjust prices are, or are likely to be, charged for water from such ditch or reservoir, they shall enter an order fixing a

day, not sooner than forty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties directly or indirectly interested in said ditch or reservoir, or in procuring water therefrom for irrigation, who may appear, as well as all testimony by witnesses, or depositions taken on notice as hereinafter provided, touching the said ditch or reservoir, and the cost of furnishing water therefrom, at which time all persons or corporations interested in said ditch or reservoir, as well as all interested in obtaining water therefrom, or in lands which may be irrigated therefrom, may appear by themselves, their agents, or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such price of water, provided the applicant shall, within ten days from the time of entering such order, cause a copy thereof, duly certified, to be delivered to the owner of such ditch or reservoir, if it be owned by one person, or each of the owners, if it be owned by several persons, or to the president, secretary or treasurer of the company, if it belongs to a corporation or association having such officers, or if such owner can not be found, he shall cause such copy to be left at his usual place of residence, with some person or member of his family residing there, and over fourteen years of age, and if such ditch officer can not be found, he shall cause such copy to be left at the office or place of business of the company of which he is such officer, or at his residence, if such company have no place of business, and if such ditch is owned by several owners, not an incorporated company, it shall be sufficient to serve such notice by delivering one such copy each to a majority of them, and such applicant shall make affidavit of the manner in which such copy or copies have been served. Depositions mentioned in section one hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking such depositions.

[G. S., § 1738; Laws 1879, p. 94, § 1.]

[Section 1 above referred to is the above section.]

[For officers before whom depositions may be taken see Code, section 376, p. 140.]

[Sections 3262 and 3263 are doubtless superseded by sections 3265-3268.]

3263. Powers and duties of commissioners—Hearing—Order—Existing contract.

SEC. 99. Said board shall hear and examine all legal testimony or proofs offered by any of the parties interested as before

mentioned, as well concerning the value of the construction of such ditch or reservoir as the cost and expense of maintaining and operating the same, and all matters which may affect the just price and value of water to be furnished therefrom; and they shall have power to issue subpoenas to witnesses and compel their attendance, which subpoenas shall be served by the sheriff of the proper county when required; and also to compel the production of books and papers required for evidence in as full and ample a manner as the district court now has. They may adjourn the hearing from time to time to further the ends of justice or suit the general convenience of parties. Upon hearing and considering all the matters and facts involved in the case, the board of commissioners shall enter an order naming and describing the ditch or reservoir with sufficient certainty, and fixing a just price upon all water to be thereafter sold, which price shall not be thereafter changed oftener than once in two years; *Provided*, That no price so fixed shall affect the rights of parties, or their lawful assignees or grantees, who may have contracts with the company, association or person owning such ditch or reservoir, or their lessees, grantees or successors, nor the rights of such owners, lessees or grantees under such contract, nor shall it in any way affect or hinder the making of such contract.

[G. S., § 1739; Laws 1879, p. 96, § 2.]
[See note section 3262.]

3264. Right to continue purchasing water—Stockholders—Rights.

SEC. 100. Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation for lands occupied by him, her or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his, her or their lands, on paying or tendering the price thereof fixed by the county commissioners as above provided, or, if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares or stock, unless they shall have retained a right to procure such water by contract, agreement or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in the same ditch.

[G. S., 1740; Laws 1879, p. 96, § 3.]

3265. County commissioners hear and consider applications.

SEC. 101. The county commissioners of each county shall, at their regular sessions in each year, and at such other sessions as they in their discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, hear and consider all applications which may be made to them by any party or parties interested, either in furnishing and delivering for compensation in any manner, or in procuring for such compensation, water for irrigation, mining, milling, manufacturing, or domestic purposes, from any ditch, canal, conduit, or reservoir, the whole or any part of which shall lie in such county. Which application shall be supported by such affidavits as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such ditch, canal, conduit, or reservoir, within such county.

[Laws 1887, p. 291, § 1.]

[Sections 3265-3268 doubtless supersede sections 3262 and 3263.]

3266. Commissioners appoint day for hearing parties interested.

SEC. 102. Every such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, conduit, or reservoir, shall enter an order fixing a day not sooner than twenty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties interested in such ditch, or other waterworks as aforesaid, or in procuring water therefrom, for any of the said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the said ditch, or other work as aforesaid, and the cost of furnishing water therefrom.

[Laws 1887, p. 292, § 2.]

3267. Hearing—Order fixing date of hearing—Service of order.

SEC. 103. At the time so fixed, all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated from such ditch, or other work aforesaid, may appear by themselves, their agents, or attorneys, and said com-

missioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water; *Provided*, The applicant or applicants (if the application be made by a party or parties as aforesaid desirous of procuring water), shall, within ten days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be delivered to the owner, or owners, of such ditch, canal, conduit, or reservoir, or to the president, secretary, or treasurer of the company, if it be owned by a corporation or association having such officers. If any such owner cannot be found, a copy shall be left at his usual place of abode, with some person residing there, over twelve years of age; and if such officer of any corporation or association cannot be found, such copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business; and if such ditch, or other work aforesaid, shall be owned by several owners not being an incorporated company, it shall be sufficient to serve notice by delivering copies to a majority of them. If the applicant be the owner or party controlling such ditch, canal, conduit, or reservoir, such notice shall be given by causing printed copies of such order in hand bill form, in conspicuous type, to be posted securely in ten or more public places throughout the district watered from such ditch, or other work aforesaid (if the water be used for irrigation), and one copy shall be posted for every mile in length of such ditch; but if such ditch, or other work, be for the supply of water for milling or mining, it shall be sufficient to serve such copy on the parties then taking water therefrom. The person or persons making such service or posting such printed copies, shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the said board of county commissioners. Depositions mentioned in section 2 hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same.

[Laws 1887, p. 293, § 3.]

[Section 2 referred to is section 3266.]

[Officers before whom depositions may be taken, Code, section 376, p. 140.]

3268. Hearing — Testimony — Commissioners fix maximum rate.

Sec. 104. Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary, or for the convenience of parties, or of public business; and they

shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well concerning the original cost and present value of works and structure of such ditch, canal, conduit or reservoir, as the cost and expense of maintaining and operating the same, and all matters which may affect the establishing of a reasonable maximum rate of compensation for water to be furnished and delivered therefrom; and they may issue subpoenas for witnesses, which subpoenas shall be served by the sheriff of the county, who shall receive the lawful fees for all such service; and said board may also issue a subpoena for the production of all books and papers required for evidence before them. Upon hearing and considering all the evidence and facts, and matters involved in the case, said board of commissioners shall enter an order describing the ditch, canal, conduit, reservoir, or other work in question, with sufficient certainty and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work as last aforesaid, within the county in which such commissioners act, and such rate shall not be charged within two years from the time when they shall be so fixed, unless upon good cause shown. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpoena of the board of county commissioners, compel obedience thereto, or punish for refusal to obey, after hearing, as in cases of attachment, for contempt of such district court.

[Laws 1887, p. 293, § 4.]

[Doubtless word "charged" in line 18, above, should read "changed."]

3269. False swearing.

SEC. 105. Every person who shall swear or affirm falsely in any matter, or testify falsely after being duly sworn or having affirmed as a witness in any proceeding provided for in this act, shall be deemed guilty of perjury, and on conviction shall be punished accordingly.

[Laws 1887, p. 294, § 5.]

[Punishment for perjury. Section 1716.]

3270. Repeal.

SEC. 106. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but such repeal shall not work any interference with any proceeding by any board of county commissioners now pending, saving that any such proceeding may, at the request of either party, be carried on to completion under the provisions hereof.

[Laws 1887, p. 294, § 6.]

[Does this repeal sections 3262-3264?]

3271. Bonus deemed an extortionate rate—Recovery.

SEC. 107. It shall not be lawful for any person owning, or controlling, or claiming to own or control any ditch, canal or reservoir, carrying or storing, or designed for the carrying or storing of any water taken from any natural stream or lake within this state, to be furnished or delivered for compensation for irrigation, mining, milling or domestic purposes, to persons not interested in such ownership or control, to demand, bargain for, accept or receive from any person who may apply for water for any of the aforesaid purposes, any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty, bonus, or premium prerequisite or condition precedent to the right or privilege of applying, or bargaining for, or procuring such water. But such water shall be furnished, carried and delivered upon payment or tender of the charges fixed by the county commissioners of the proper county, as is, or may be, provided by law. Any and all moneys, and every valuable thing, or consideration of whatsoever kind, which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge, or consideration for the water intended to be furnished and delivered therefor, or because thereof, and wholly extortionate and illegal; and when paid, delivered, or surrendered, may be recovered back by the party paying, delivering, or surrendering the same from the party to whom, or for whose use, the same shall have been paid, delivered, or surrendered, together with costs of suit, including reasonable fees of attorneys of plaintiff, by proper action in any court having jurisdiction.

[Laws 1887, p. 308, § 1.]

3272. Penalty for collecting excessive rate.

SEC. 108. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, demand, require, bargain for, accept, receive or retain from the party making such application, any money or consideration whatever, as such royalty, bonus, premium, pre-other thing of value, or any promise or contract, or any valuable

requisite or condition precedent, as is by the provisions of this said first section prohibited, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court.

[Laws 1887, p. 309, § 2.]

[Section 1 referred to above is section 3171.]

3273. Penalty for refusal to deliver water.

SEC. 109. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing, made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, refuse to furnish or carry and deliver from such ditch, canal or reservoir, any water so applied for, which water can or may be by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal or reservoir, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term of not less than three months, nor more than one year, or both such fine and imprisonment, in the discretion of the court.

[Laws 1887, p. 309, § 3.]

[Section 1 referred to above is section 3271.]

[When ditch company must furnish water. Section 992.]

3274. Action when corporation refuses to deliver water.

SEC. 110. When any corporation, in defiance or by attempted evasion of the provisions of this act, shall, after tender of the compensation hereinbefore provided for, refuse to deliver water, such as is mentioned in the third section of this act, to any person lawfully entitled to apply therefor, it shall be the duty of the attorney general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination, proceedings in quo warranto, for the forfeiture of the corporate rights, privileges and franchises of any such corpora-

tion so offending, or by mandamus or other proper proceedings to compel it to its duty in that behalf.

[Laws 1887, p. 309, § 4.]

[Section 3 referred to above is section 3273.]

3275. "Person" defined—Liability.

SEC. 111. The word "Person," as used in this act, shall include corporations and associations, and the plural as well as the singular number. And every officer of a corporation, or member of an association, or co-ownership, and every agent violating any of the provisions of this act, shall be liable to restore the unlawful consideration extorted, and be punishable under the penal provisions of this act, the same as if the thing done in disobedience to its provisions were done for his own sole benefit and advantage.

[Laws 1887, p. 310, § 5.]

IV. ADJUDICATION OF PRIORITIES.

- A. PROCEEDINGS BEFORE COURT.—3276-3290.
- B. PROCEEDINGS BEFORE REFEREE.—3291-3306.
- C. APPEALS.—3307-3312.
- D. GENERAL PROVISIONS.—3313-3320.

A. PROCEEDINGS BEFORE COURT.

Section.

- 3276. Adjudication of irrigation priorities—Jurisdiction of court.
- 3277. Filing statement of claim—Contents.
- 3278. Secretary of state make publication—Publisher's certificate.
- 3279. Secretary's certificate—Where filed—Effect.
- 3280. Adjudication of priorities other than irrigation—Petition.
- 3281. Court number water rights.
- 3282. Protection of vested rights.
- 3283. Distribution by water commissioner.
- 3284. Petition to adjudicate—Order—Hearing—Decree—Certificate by clerk.
- 3285. Copy of decree—Authority of commissioner—Recording—Copy—Evidence.
- 3286. Clerk publish notice—Copies posted.
- 3287. Proof of publication and posting copies—Entry by clerk.
- 3288. Notice served on all parties—How served—Notice by mail.
- 3289. After decree entered no further publication required in subsequent proceedings, unless.
- 3290. Court number all ditches and reservoirs—Number appropriations.

3276. Adjudication of irrigation priorities—Jurisdiction of courts.

SEC. 112. For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after

the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose, as hereinafter provided for, shall be commenced; but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided, such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force.

[G. S., § 1762; Laws 1879, p. 99, § 19.]

[Adjudication of priorities other than irrigation. Section 3280.]

3277. Filing statements of claim—Contents.

SEC. 113. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number —, as the case may be, which statement shall contain the name or names, together with the post-office address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, canal or reservoir, the name thereof (if any), and, if without a name, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch canal or feeder of reservoir, and also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir. Said statement shall be signed by the proper party or parties.

[G. S., § 1763; Laws 1881, p. 142, § 1.]

[Claim must be filed before party can offer evidence, see section 3316.]

3278. Secretary of state make publication—Publisher's Certificate.

SEC. 114. The secretary of state shall, without delay, after the passage of this act, cause a certified copy of the foregoing section, giving the date of the approval of this act, to be published in one of the public newspapers published in such county in which part or portion of any water district is or shall be established by law at the time of such publication; and said section one shall be published as aforesaid, once in each and every week continuously in said paper until said first day of June, A. D. 1881, and in case in the meantime any one of said papers shall cease to be published, then such publication shall be made in some other paper in same county, (if any), and on conclusion of such publication such publisher of such paper shall deliver to the secretary of state his sworn certificate of publication in duplicate showing that such publication has been made in his paper in compliance with the preceding section hereof, and stating the first and last day of such publication; and he shall thereupon be entitled to receive from the secretary of state a certificate of the amount due him for such publication, on presentation of which to the auditor of state he shall draw his warrant for the amount in favor of the holder on the state treasurer, who shall pay the same according to law.

[G. S., § 1764; Laws 1881, p. 143, § 2.]

[Section 1 referred to above is section 3277.]

3279. Secretary's certificate—Where filed—Effect.

SEC. 115. The secretary of state shall file one of said duplicate certificates of publication with the clerk of the district court having jurisdiction of priority of rights to use of water for irrigation in the proper water district, certifying officially that such publication therein mentioned was duly authorized by him, and said clerk shall file the same with the statement of claim provided for in section one hereof, and such certificate of such publisher or any additional certificate of same publisher to same fact in case of loss of the original, shall be proof of the proper publication of said section in the paper therein mentioned. Said secretary of state shall also certify to such clerk of the several district courts having jurisdiction of said priorities of right to use of said water for irrigation throughout the state, the names of the newspapers, and of the county in which he caused such publication to be made, and that the duplicate certificate of publication of the publisher, as herein required are on file in his office, and said certificate shall be sufficient proof of the publication of said section one hereof, as by this act required.

[G. S., § 1765; Laws 1881, p. 144, § 3.]

[Section 1 referred to above is section 3277.]

3280. Adjudication of priorities other than irrigation—Petition.

SEC. 116. That the owner or owners of any water rights derived from any natural stream, water-course or any other source, acquired by appropriation and used for any beneficial purpose other than irrigation, may have his or their right thereto established and decreed by the district court having jurisdiction of the adjudication of water rights for irrigation purposes in the water district in which said water rights are situated, by petitioning said court in the same manner and by complying with the procedure and the requirements of the law now applicable to the adjudication of water rights for irrigation purposes.

[Laws 1903, p. 297, § 1.]

[Adjudication of priorities for irrigation. Section 3276.]

3281. Court number water rights.

SEC. 117. The said district court shall number, consecutively and chronologically, all such water rights similar to the system of numbering priorities for irrigation purposes, designating the amount of each appropriation in cubic feet per second of time; and shall specifically state the particular purpose for which said appropriation is granted, that is, whether the same is for power or manufacturing purposes, domestic use, storage purposes, or any other beneficial use of said waters. All of such appropriations, other than appropriations for irrigation purposes, shall be designated by and in the one series of consecutive numbers herein provided for.

[Laws 1903, p. 297, § 2.]

3282. Protection of vested rights.

SEC. 118. In determining such water rights, it shall be the duty of the court to recognize and protect; as far as possible under the constitution of this state and the decisions of the appellate courts applicable thereto, the vested rights of all appropriations of water for irrigation purposes, especially where such rights have been duly adjudicated by the said court in the statutory proceedings for the determination of the priority of rights to the use of water for irrigation purposes. .

[Laws 1903, p. 298, § 3.]

3283. Distribution by water commissioner.

SEC. 119. It shall be the duty of the water commissioner in each water district to distribute the waters decreed hereunder and

to protect the priority rights of the respective owners of water rights for any beneficial purposes from and after their determination by said court, in the same manner as he is now required by law to superintend the distribution of waters throughout his district for irrigation purposes, and he shall receive like compensation for such services from the county in which such water rights are situated; and other counties embraced in his water district shall not be liable for any portion of such service; *Provided, further*, That no water commissioner or irrigation official shall make any division or distribution of any water between the users thereof from the same ditch or reservoir.

[Laws 1903, p. 298, § 4.]

**3284. Petition to adjudicate—Order—Hearing—Decree—
Certificate by clerk.**

SEC. 120. When, at any time after the first day of June, A. D. 1881, any one or more persons, associations or corporations, interested as owners of any ditch, canal or reservoir in any water district shall present to the district court of any county having jurisdiction of priority of rights to the use of water for irrigation in such water district according to the provisions of an act entitled "An act to regulate the use of water for irrigation and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," or to the judge thereof in vacation, a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigation between the several ditches, canals and reservoirs in such district, the court, or judge thereof in vacation, shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, as prayed for, by an order to be entered of record upon such motion, petition or application, appoint a day, in some regular or special term of said court, for commencing to hear and take evidence in such adjudication, at which time it shall be the duty of the court to proceed to hear all evidence which may be offered by or on behalf of any person, association or corporation, interested in any ditch, canal or reservoir, in such district, either as owner or consumer of water therefrom in support of or against any claim or claims of priority of appropriation of water made by means of any ditch, canal or reservoir, or by any enlargement or extension thereof in such district, and consider all such evidence, together with any and all evidence, if any, which may have been heretofore offered and taken in such district in the same manner by any

referee heretofore appointed under the provisions of said act above herein mentioned, and also the arguments of parties or their counsel, and shall ascertain and find from such evidence, as near as may be, the date of the commencement of such ditch, canal or reservoir, together with the original size and carrying capacity thereof as originally constructed, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time spent, severally, in such construction and enlargement, or extension, and re-enlargement, if any, the diligence with which the work was in each case prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show the compliance with the law, in acquiring the priority of right claimed for each such ditch, canal or reservoir, and determine the matters put in evidence, and make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water, of the several ditches, canals and reservoirs in such water district, concerning which testimony shall have been offered, each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements, or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal or reservoir, shall receive from the clerk, on payment of a reasonable fee therefor, to be fixed by the court, a certificate under seal of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal or reservoir, under and by virtue of the construction, extension and enlargements thereof, severally; also specifying the number of said ditch and of each priority to which the same may be entitled by reason of such construction, extension and enlargements.

[G. S., § 1766; Laws 1881, p. 144, § 4.]

[The act above referred to is found L. '79, p. 95-108.]

3285. Copy of decree—Authority of commissioner—Recording—Copy—Evidence.

SEC. 121. The holder of such certificate shall exhibit the same to the water commissioner of the district when he commences the exercise of his duties, and such water commissioner shall keep a book in which shall be entered a brief statement of the contents

of such certificate, and which shall be delivered to his successor, and said certificate, or statement thereof, in his book, shall be the warrant of authority to said water commissioner for regulating the flow of water in relation to such ditch, canal or reservoir. Said certificate shall be recorded, at the same rates of charges as in cases of deeds of conveyance, in the records of each county into which the ditch, canal or reservoir, to which such certificate relates, shall extend; and said certificate, or said record thereof, or a duly certified copy of such record, shall be prima facie evidence of so much of said decree as shall be recited therein, in any suit or proceeding in which the same may be relevant.

[G. S., § 1767; Laws 1881, p. 146, § 5.]

3286. Clerk publish notice—Copies posted.

SEC. 122. Notice shall be given by the clerk of said court, of the time so appointed, by publishing the same in one public newspaper in such county into which such water district may extend; which notice shall be so published in such paper once in each week until four successive weekly publications shall have been made, the last of which shall be on a day previous to the day appointed as aforesaid. Said notice shall contain a copy of said order, and shall notify all persons, associations and corporations interested as owners in any ditch, canal or reservoir in such water district, to appear at said court at the time so appointed and file a statement of claim under oath, in case no statement has been before filed by him, her or them, showing the ditch, canal or reservoir, or two or more such, in which he, she or they claim an interest, together with the names of all the owners thereof, which statement may be made by any one of the owners of such ditch, canal or reservoir for and in behalf of all; and also that all persons interested as owners or consumers may then and there present his, her or their proofs for or against any priority of right of water by appropriation sought to be shown by any party by or through any such ditch, canal or reservoir, (either as owner or consumer of water drawn therefrom). Ten printed copies of said notice shall also be posted in ten public places in such water district, not less than twenty days before the day so appointed, which copies shall be so posted by the party or parties moving the adjudication.

[G. S., § 1768; Laws 1881, p. 147, § 6.]

3287. Proof of publication and posting copies—Entry by clerk.

SEC. 123. Proof of the proper publication of said notice or notices in said public papers shall consist in such case of the sworn

certificate of the publisher of such newspaper, showing the publication to have been made in accordance with the provisions of section three of this act, which certificates shall be procured by the party or parties moving the adjudication, at his or their expense, and on said certificate being filed the clerk shall enter the amount of the printer's fee therefor as costs advanced by the party procuring the same, which sum shall be counted to his, her or their credit in distribution of costs. Proof of the posting of said printed copies shall be made by the affidavit of some credible person, certified to be such by the clerk or other officer administering the oath, showing when, where and how said copies were posted.

[G. S., § 1769; Laws 1881, p. 147, § 7.]
[Section 3 referred to above is section 3282.]

3288. Notices served on all parties—How served—Notice by mail.

SEC. 124. The party or parties moving such adjudication shall cause a printed or written copy of the notice aforesaid, published as aforesaid, to be served on every person, association or corporation shown by the statement of claim on file, as provided in section one hereof, which service shall be made within ten days from the time of the first publication by the clerk, by any credible person certified by said clerk or referee to be such, by delivering such copy as aforesaid to the person to be served, if such person, by due diligence, can be found in the county of his residence. If such person cannot be found, as aforesaid, then, by leaving such copy at his or her usual place of residence, if he or she have such residence, in charge of some person of the age of fourteen years or over, there residing; and on any corporation, by delivering the copy to the president, or vice-president, or secretary, or treasurer thereof, or the manager, or superintendent in charge of their ditch, canal or reservoir, or authorized agent or attorney, or by leaving such copy at the office or usual place of business of such corporation, and the proof of such service shall be made by affidavit of the person or persons serving said copies, showing when and how such service has been made on such party. In case of parties not served in any manner as aforesaid, the clerk shall deposit in the postoffice, duly enclosed in an envelope with the proper postage stamp thereon, a copy directed to the address of such party, shown in the statement of claim aforesaid, filed by him or her under section one hereof.

[G. S., § 1770; Laws 1881, p. 148, § 8.]
[Section 1 referred to above is section 3277.]

3289. After decree entered no further publication required in subsequent proceedings, unless.

SEC. 125. That in all water right adjudication proceedings brought under the statutes of this state for determining and decreeing priority rights to the adjudicated water right, after a general decree has been entered in such water district, in pursuance of the statutory notice by publication and posting, as now required by law, no further publication or posting of such notice or any notice of such individual subsequent proceedings shall be required unless by order of court upon good cause shown therefor; and in all such proceedings subsequent to the entry of such general decree, written notice shall be given for such length of time and be served upon the parties interested adversely in such manner as is now or may hereafter be provided by law for the service of summons in other civil cases; or in such reasonable time and manner as may be fixed by rule of court; *Provided*, Such notice shall contain the date and amount of the priority right claimed in each case, the source of supply from which same shall be taken, and in case of a transfer of a water right the notice shall contain a brief description of the water right sought to be transferred, the place and ditch, if any, from which and to which the change is desired, and which notice shall give the date that the hearing will be had, and be served not less than fifteen days prior to the date of such hearing; and which notice shall be dated and may be signed and issued either by the attorney for the petitioner or by the clerk of the district court. This act shall not be construed as a repeal of any of the statutes now existing relative to notice in any water right proceedings; and in any proceeding for any of the purposes herein set forth the petitioner may, at his election, proceed under this act, or under the statutes in force at the time of the passage of this act.

[Laws 1905, p. 244, § 1.]

[For service of summons see Code, section 40, p. 81.]

3290. Court number all ditches—Reservoirs—Number appropriations.

SEC. 126. The court, in making such decree, as aforesaid, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals,

and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs by means of which such appropriations were made; whether such appropriation shall have been made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section one of this act, so as to show the order in priority of such ditch or canal, and of such reservoir, and also of such successive appropriation of water pertaining thereto, for the information of the water commissioner of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered.

[Laws 1905, p. 244, § 2.]

[Section 1 referred to is section 3277.]

B. PROCEEDINGS BEFORE REFEREE.

Section.

- 3291. When court may appoint referee—What referred.
- 3292. Referee's notice—Contents—Publication—Posting copies.
- 3293. Proof of posting notices.
- 3294. Who may offer evidence.
- 3295. When former evidence may be used.
- 3296. Powers and duties of referee—Books and records, evidence.
- 3297. Refusal to produce books or papers—Effect.
- 3298. What facts to be ascertained by proofs.
- 3299. Contempt before referee.
- 3300. Compensation of referee—How paid—Accounts.
- 3301. Fees of witnesses—By whom paid.
- 3302. Duties of referee—Rights of parties—Adjournment—Notice.
- 3303. Rights of parties against referee for neglect, oppression, etc.
- 3304. Report of referee—Contents.
- 3305. Filing report—Court proceed to determine—Exceptions—Approval—Entry.
- 3306. Court may dismiss referee—Vacancy—New appointment.

3291. When court may appoint referee—What referred.

SEC. 127. If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in

open court, he shall, instead of the order mentioned in section four of this act, make and cause to be entered of record an order appointing some discreet person, properly qualified, a referee of said court, to whom shall be referred the statement of claim aforesaid on file in said matter, the matter of taking evidence and reporting the same, making an abstract and findings upon the same, and preparing a decree in said adjudication; and also in case of any water district in which a referee has been heretofore appointed, and evidence taken by him under the provisions of the act, the title of which is recited in section four of this act; such evidence so already taken, together with the abstract thereof, and report of the referee who took the same, shall be also referred to said referee, to be appointed as aforesaid, and he shall proceed with his duties as hereinafter provided, first taking an oath of office, such as is required to be taken by referees in other cases under the provisions of the code of civil procedure.

[G. S., § 1772; Laws 1881, p. 149, § 10.]

[Section 4 above referred to is section 3284.]

[For oath of referee see Code section 224, p. 117.]

3292. Referee's notice — Contents — Publication — Posting copies.

Sec. 128. Said referee shall prepare and publish a notice containing a copy of the order appointing him, in which notice he shall appoint a time or times, and place or places, suitable and convenient for the claimants in such water district, at which he will attend for the purpose of hearing and taking evidence touching the priority of right of the several ditches, canals and reservoirs in said district and notifying all persons, associations, and corporations interested as owners or consumers of water to attend by themselves, their agents or attorneys, at the times and places appointed in said notice, and notifying such owners to then and there file a statement of claim in case such statement has not been already filed under the provisions of section one hereof, such as mentioned in section six hereof, and present their proofs touching any priority of right claimed by them for any ditch, canal or reservoir in said district, which notice shall be published in the same manner and times, and in all respects according to the provisions for publication of the newspaper notices mentioned in section six of this act, and proof of such publication shall be made in same manner as is provided in section seven of this act; and he shall also post ten or more printed copies of such notice in ten or more

public places in said district, which copies shall be so posted at least twenty days before the time of commencing to take said evidence.

[G. S., § 1773; Laws 1881, p. 150, § 11.]

[Section 6 above referred to is section 3286.]

[Section 1 referred to is section 3277.]

[Section 7 referred to is section 3287.]

3293. Proof of posting notices.

SEC. 129. Proof of the posting of said copies shall be made by the affidavit of said referee or other person certified by him to be a credible witness, which shall show when, where and how the said copies were posted, and shall be filed by him with his report.

[G. S., § 1774; Laws 1881, p. 151, § 12.]

3294. Who may offer evidence.

SEC. 130. Said referee shall attend at the times and places mentioned in his notice for the purpose therein mentioned; and all persons, associations, choosing to do so, and being interested as owners of or consumers of water from any ditch, canal or reservoir in said district, and may also attend by themselves, their agents or attorneys, before said referee, at some one or more of said times and places so appointed, and shall have right to offer any and all evidence they may think advisable for their interests in the matter to be adjudicated, as well in districts in which evidence has been heretofore taken as in other districts. All such evidence as has been heretofore taken, if any, in such district, shall be kept present by said referee, subject to inspection by any party desiring to examine the same for purposes of the investigation.

[G. S., § 1775; Laws 1881, p. 151, § 13.]

[Claim must be filed before party can offer evidence. Section 3316.]

3295. When former evidence may be used.

SEC. 131. Whenever testimony shall or may be taken, in any district created by this act, for the purpose of procuring decree as to appropriation of water, and priorities thereof, under the statutes of this state, any testimony theretofore taken, before any former referee, may be introduced and shall be received as evidence.

[Laws 1885, p. 259, § 28.]

3296. Powers and duties of referee—Books and records, evidence.

SEC. 132. Said referee shall have power to administer oaths to all witnesses, and to issue subpoenas for witnesses and subpoenas

duces tecum, which subpoenas may be served by any party, or constable, or sheriff, or deputy sheriff, and may require witnesses to appear at any of the places appointed by said referee for taking evidence. He shall permit all witnesses to be examined by the parties calling them respectively and to be cross-examined by any party interested, and he shall take all testimony in writing and note all objections offered to any part of the testimony taken, with the cause assigned for the objection, and shall proceed in all other respects as in case of taking depositions. He shall certify all books and papers offered by any one in his own behalf, and preserve them with the testimony offered concerning the same, and in case of books and papers offered in evidence, which shall not be under the control of the party desiring the evidence for which such books may be offered, said referee shall make a true copy of the parts demanded and certify the same, and preserve the same, together with the evidence offered concerning the same and concerning said books and papers, as part of the evidence in the matter.

[Laws 1881, p. 151, § 14.]

3297. Refusal to produce books or papers—Effect.

SEC. 133. No person, association or corporation wilfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her or their behalf, in making final adjudication, if the court shall be satisfied, from all the evidence shown concerning such refusal, that the same was wilful.

[G. S., § 1777; Laws 1881, p. 152, § 15.]

3298. What facts to be ascertained by proofs.

SEC. 134. Said referee shall also examine all witnesses to his own satisfaction, touching any point involved in the matter in question, and shall ascertain as far as possible the date of the commencement of each ditch, canal or reservoir, with the original size and carrying capacity thereof, the time of the commencement of each enlargement thereof, with the increased carrying capacity thereby occasioned, the length of time spent in such construction or enlargement, the diligence with which the work was prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show compliance with the law in acquiring the priority of right claimed for such ditch, canal or reservoir; and upon all the facts so obtained shall be determined

the relative priorities among the several ditches, canals and reservoirs, the volume or amount of water lawfully appropriated by each, as well as by means of the construction, as by the enlargements thereof, and the time when each such several appropriations took effect.

[G. S. § 1778. Laws 1881, p. 151, § 16.]

3299. Contempt before referee.

SEC. 135. Every person present before said referee at any time when he shall be engaged in hearing testimony, who shall wilfully disturb the proceedings; and every person who shall wilfully refuse or neglect to obey any subpoena issued by said referee, when his lawful fees shall be tendered him for his attendance before the referee, shall be guilty of contempt of the court appointing such referee, and on complaint, under oath of the referee or other person, before the said district court, or judge thereof in vacation, may be brought before the court or judge and dealt with accordingly.

[G. S., § 1779; Laws 1881, p. 152, § 17.]

3300. Compensation of referee—How paid—Accounts.

SEC. 136. The referee appointed in this act shall be paid the sum of six dollars per day while engaged in discharging his duties as herein provided, and also his reasonable and necessary expenses and mileage at the rate of ten cents for each mile actually and necessarily traveled by him in going and coming in the discharge of his duties as such referee, which said per diem allowance, expenses and mileage shall be paid out of the treasury of the county in which such water district shall lie, if it be contained in one county, and if such water district shall extend into two or more counties, then in equal parts thereof, shall be paid out of the treasury of such county into which such district shall extend. He shall keep a just and true account of his services, expenses and mileage and present the same from time to time to the district court, or judge in vacation verifying the same by oath, and the judge, if he find the same correct and just, shall certify his approval thereof thereon, and the same shall thereupon be allowed by the board of county commissioners of the county in which said water district shall lie, but if said water district extend into two or more counties, he shall receive from the clerk of the district court separate certificates, under seal of the court, showing the amount due him from each county, upon which cer-

tificate the board of county commissioners of the respective counties shall allow the same on presentation thereof.

[G. S. § 1798. Laws 1881, p. 152, § 36.]

3301. Fees of witnesses—By whom paid.

SEC. 137. Every witness who shall attend before said referee under subpoena by request of any party, shall be entitled to the same fees and mileage as witnesses before the district court in the county in which he shall so attend, and shall be paid by the party requiring his testimony.

[G. S. § 1780. Laws 1881, p. 152, § 18.]

[For fees and mileage of witnesses, see sections 2542 and 2543.]

3302. Duties of referee—Rights of parties—Adjournment—Notice.

SEC. 138. The said referee shall take all the testimony offered, and for that purpose shall give reasonable opportunity to all parties to be heard, and may at any place, when the time limited thereat shall expire, adjourn the further taking of testimony then proposed or desired to be offered to the next place in order, according to his said published appointments, and at the last place may continue until all testimony shall be taken, or make further appointments at any former place or places as may seem best and most convenient for all parties, giving reasonable notice thereof.

[G. S. § 1781. Laws 1881, p. 152, § 19.]

3303. Rights of parties against referee for neglect, oppression, etc.

SEC. 139. Every party interested shall have the right to complain to the court of any act of wilful neglect or oppression on the part of the said referee in exercising his powers under this act, whereby such party shall have been aggrieved, either by refusal of said referee to hear or take evidence offered, or by preventing reasonable opportunity to offer such evidence; and the court may order such proceedings in the premises as will give redress of the grievance, at the cost of said referee, if he appear wilfully in fault; otherwise, in case of accident or mistake, costs shall be awarded as to the court shall seem just.

[G. S. § 1785. Laws 1881, p. 152, § 23.]

3304. Report of referee—Contents.

SEC. 140. Said referee, upon closing the testimony, shall proceed to carefully examine the same, together with all testimony

and proofs which may have been heretofore taken by any former referee in the same district, if any such shall have been taken, under the provisions of said act, the title of which is recited in section four of this act; he shall make an abstract of all the testimony and proofs in his possession, concerning each ditch, canal and reservoir separately, and shall number each ditch and canal in order, and likewise each reservoir, each class consecutively, and also number the several appropriations of water shown by the evidence, all in manner and form as provided in section nine hereof, and shall make a separate finding of all the facts connected with each ditch, canal and reservoir, touching which evidence shall have been offered; and he shall prepare a draft of a decree in accordance with his said findings, in substance the same as the decree mentioned in section four of this act, and conformable also to the provisions of section nine hereof, so far as the same are applicable; which decree, so prepared by him, shall be returned with his report to the court, and he shall file his report with said evidence, abstract and findings, and said decree, with the clerk of the court, and inform the judge of so doing, without delay.

[G. S. § 1782. Laws 1881, p. 152, § 20.]

[Sections 4 and 9 referred to above are sections 3284 and 3290.]

3305. Filing report—Court proceed to determine—Exceptions—Approval—Entry.

SEC. 141. Upon the filing of said report the court, or judge thereof in vacation, shall cause an order to be entered setting some day in a regular or special term of said court as soon as practicable, when the court will proceed to hear and determine the report; at which time any party interested may appear by himself or counsel and move exceptions to any matter in the findings or decree made by said referee, and after hearing the same the court shall, if the decree reported be approved, cause the same to be entered of record, or otherwise such modifications thereof or other decree as shall be found just and conformable to the evidence and the true intent of this act, and to so much of any and all former laws of the state as shall be adjudged consistent herewith.

[G. S. § 1783. Laws 1881, p. 152, § 21, cited under § 3277.]

3306. Court may dismiss referee—Vacancy—New appointment.

SEC. 142. The district court, or judge thereof in vacation, in case of the death, resignation, illness, absence or other disability

of the referee hereby provided for, or for any misconduct in him, or other good cause to such judge appearing, shall appoint such other properly qualified person in his stead as he shall deem proper, who shall proceed without delay to perform all the duties of his office, as herein pointed out, which shall remain unperformed by his predecessor in office.

[G. S. § 1795. Laws 1881, p. 152, § 33.]

C. APPEALS.

Section.

- 3307. Who may appeal—Statement—Approval—Order—Bond.
- 3308. Copy of appeal served on appellees—Publication and posting copies—Proof.
- 3309. Proof of service of notice—Supreme court make rules.
- 3310. Transcript to be filed in six months—Bill of exceptions.
- 3311. Costs in supreme court.
- 3312. Supreme court amend or make new decree or remand.

3307. Who may appeal — Statement — Approval — Order — Bond.

SEC. 143. Any party or parties representing any ditch, canal or reservoir, or any number of parties representing two or more ditches, canals or reservoirs, which are affected in common with each other by any portion of such decree, by which he or she or they may feel aggrieved, may have an appeal from said district court to the supreme court, and in such case the party or parties joining, desiring an appeal, shall be the appellants, and the parties representing any one or more ditches, canals or reservoirs affecting in common adversely to the interests of appellants shall be the appellees. The party or parties joining in such appeal shall file a statement in writing, verified by affidavit properly entitled in such cause in the district court, which statement shall show that the appellants claim a valuable interest in the ditch, canal or reservoir, or two or more of such, which are affected in common with each other by some portion of said decree, also stating the name or names, or otherwise the description of the same, and the name or names, or otherwise the description of any one or more other ditches, canals or reservoirs, which by said decree derive undue advantage in respect of priority as against that or those represented by appellants; and also setting forth the name or names of the party or parties claiming such other one or more

ditches, canals or reservoirs, affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other parties as appellees. If the court or judge in vacation, on examination, find such statement in accordance with the statements of claim filed by the parties named as appellees, mentioned in section one of this act, he shall approve the same and make an order to be prepared and presented by the appellants allowing the appeal and showing the name or names of the appellants and appellees, with the name or names or description of the one or more ditches, canals or reservoirs, claimed by the party or parties appellant or appellee, as shown by their several statements of claim filed as aforesaid, before the taking of testimony, and fix the amount of the appeal bond, which bond shall be executed by one or more of appellants, as principal or principals, and by sufficient securities, and approved by the court or judge in vacation, and shall be conditioned for the payment of all costs which may be awarded against the appellants or any of them in the supreme court.

[G. S. § 1789. Laws 1881, § 27.]

3308. Copy of order served on appellees—Publication and posting copies—Proof.

SEC. 144. The order last aforesaid shall be entered of record, and the appellant or appellants shall cause a certified copy thereof to be served on each of the appellees, by delivering the same to him or her, if he or she may be found, or otherwise serving the same in manner the same as may be at the time approved for serving summons from the district court by the laws then in force, and shall also cause the said order to be published in the same manner as the notices required to be published by the referee mentioned in section eleven of this act, and proof of the publication in any newspaper shall be the same as in case of said referee's notice, and proof of the posting of the ten printed copies in the district shall be by affidavit of the party posting the same, with the certificate of the clerk of the district court appealed from, that the affiant is a known and credible person.

[G. S. § 1790. Laws 1881, p. 152, § 28.]

[Section 11 above referred to is section 3292.]

[For service of summons see Code, section 40, p. 81.]

3309. Proof of service of notice—Supreme court make rules.

SEC. 145. The said proof of the service and publication of said order allowing the appeal shall be filed with the clerk of the supreme court within sixty days after the making of said

order, and if not so filed, the supreme court shall, on motion of the appellee or any of the appellees, at any time after such default in filing said proof, and before the said proof shall be filed, dismiss such appeal, and if the transcript of record be not filed within the time limited by section twenty-nine of this act, such appeal shall, on motion, be dismissed. After the filing of the record and proof of service aforesaid, the cause on appeal shall be proceeded with as the rules of the supreme court, or such special rules as said court may make in such cases, and their order from time to time thereunder may require. Said court shall have power to make any and all such rules concerning such appeals as may be necessary and expedient in furtherance of this act, as well as to preparation of the case for submission as to supplying deficiencies of record, if any, and for avoiding unnecessary costs and delay.

[G. S. § 1794. Laws 1881, p. 152, § 32.]
[Section 29 above referred to is section 3310.]

3310. Transcript to be filed in six months—Bill of exceptions.

SEC. 146. The appellant or appellants shall file the transcript of record of the district court with the clerk of the supreme court at any time within six months after the appeal shall be allowed as aforesaid. Only so much of the decree appealed from, and so much of the evidence as shall affect the appropriations of water claimed by means of the construction or enlargement or re-enlargement of the several ditches, canals and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions.

[G. S., § 1791; Laws 1881, p. 157, § 29.]

3311. Costs in supreme court.

SEC. 147. The supreme court, on dismissal of such appeal, or on affirming or reversing the parts of the decree appealed from, in whole or in part, shall award costs, as in its discretion shall be found and held to be equitable.

[G. S. § 1792. Laws 1881, p. 152, § 30.]

3312. Supreme court amend or make new decree, or remand.

SEC. 148. The supreme court, in all cases in which judgment is rendered, and any part of the decree appealed from is reversed, and in which it may be practicable, shall make such decree in the matters involved in the appeal as should have been made by the district court, or direct in what manner the decree of that court shall be amended.

[G. S., § 1793; Laws 1881, p. 153, § 31.]

D. GENERAL PROVISIONS.

Section.

3313. Suit must be brought in four years—Injunction—Commissioner's duty.
3314. After four years suit barred.
3315. Court may make rules—Act liberally construed.
3316. Party must file claim before offering evidence.
3317. Effect of failure to offer evidence.
3318. Re-argument—Review—Limitation two years.
3319. Sheriff not to serve writ outside his county.
3320. Fees of district clerk—How audited—Paid.
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3313. Suits must be brought in four years—Injunctions—Commissioner's duty.

SEC. 149. Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order.

[G. S., § 1796; Laws 1881, p. 159, § 34.]

3314. After four years suit barred.

SEC. 150. After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose

interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree.

[G. S. § 1797. Laws 1881, p. 152, § 35.]

3315. Court may make rules—Act liberally construed.

SEC. 151. The district court, or judge thereof in vacation, shall have power to make all orders and rules consistent with this act which may be found necessary and expedient, from time to time during the progress of the case, for carrying out the intent of this act, and of all parts consistent therewith of the said act, the title of which is recited in section four thereof; as well touching the proceedings in court as of the acts and doings of said referee, for the purpose of securing to any party aggrieved by the acts of said referee or any proceeding of the court, opportunity for redress; and this act shall be construed liberally in all courts, in favor of securing to all persons interested the just determination and protection of their rights.

[G. S. § 1786. Laws 1881, p. 152, § 24.]

[Section 4 above referred to is section 3284.]

3316. Party must file claim before offering evidence.

SEC. 152. No persons, association or corporation representing any ditch, canal or reservoir, shall be permitted to give or offer any evidence before said referee until he, she or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provisions of section one hereof.

[G. S. § 1787. Laws 1881, § 25.]

[Section 1 referred to is section 3277.]

3317. Effect of failure to offer evidence.

SEC. 153. No claim of priority of any person, association or corporation, on account of any ditch, canal or reservoir, as to which he, or she, or they shall have failed or refused to offer evidence under any adjudication herein provided for or heretofore provided for by said act, the title of which is recited in section four hereof, shall be regarded by any water commissioner in distributing water in times of scarcity thereof, until such time as such party shall have by application to the court having jurisdiction, obtained leave and made proof of the priority of right to which such ditch, canal or reservoir shall be justly entitled, which

leave shall be granted in all cases upon terms as to notice to other parties interested, and on payment of all costs, and upon affidavits or petition sworn to, showing the rights claimed and the ditches, canals and reservoirs, with the names of the owners thereof against which such priority is claimed, nor until a decree adjudging such priority to such ditch, canal or reservoir has been entered, and certificate, such as mentioned in section four hereof, shall have been issued to claimant and presented to the water commissioner.

[G. S. § 1784. Laws 1881, p. 152, § 22.]
[Section 4 referred to is section 3284.]

3318. Re-argument—Review—Limitation two years.

SEC. 154. The district court, or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of.

[G. S., § 1788; Laws 1881, p. 156, § 26.]

3319. Sheriff not serve writ outside his county.

SEC. 155. Nothing herein contained shall be construed to authorize any sheriff to serve any writ outside the limits of his own county, or give effect to any record by way of notice or otherwise, in any county other than that in which he belongs.

[G. S., § 1800; Laws 1879, p. 106, § 35.]

3320. Fees of district clerk—How audited—Paid.

SEC. 156. The fees of the clerk of the district court for a service rendered under this act shall be paid by the counties interested in the same manner as the fees of the water commissioners, upon the said clerk rendering his account certified by the district judge to the board or boards of county commissioners of the county or counties embracing the water district in case of which the services shall have been rendered.

[Laws 1879, p. 108, § 43.]

V. STATE ENGINEER.

Section.

- 3321. State engineer—Appointment—Office—Salary—Oath—Bond.
 - 3322. General duties of state engineer.
 - 3323. Shall approve designs and plans.
 - 3324. Supervision over division engineers and water commissioners.
 - 3325. Additional duties of engineer.
 - 3326. Appoint deputy for special work.
 - 3327. Deputies—Appointment—Oath—Engineer liable for acts.
 - 3328. Pay of deputies and assistants.
 - 3329. Require owner of ditch to construct and maintain a measuring weir.
 - 3330. Cubic foot per second, unit of measurement.
 - 3331. Report of state engineer.
 - 3332. Fees collected by state engineer.
 - 3333. Fees deposited with state treasurer.
 - 3334. Application of fees.
 - 3334-A. State engineer record data as to water supply.
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3321. State engineer—Appointment—Office—Salary—Oath—Bond.

SEC. 157. The governor shall appoint a state engineer, who shall hold his office for the term of two years, or until his successor shall be appointed and qualified. The governor may at any time, for cause shown, remove said state engineer. The said state engineer shall have his office at the state capitol, in suitable rooms to be provided for him by the secretary of state, who shall furnish him with suitable furniture, postage and such proper and necessary stationery, books and instruments as are required to best enable him to discharge the duties of his office. He shall be paid a salary of three thousand dollars per annum, payable monthly by the state treasurer, on warrants drawn by the state auditor. The said state engineer shall, before entering on the discharge of his duties, take and subscribe to an oath, before the judge of a state court of record, to faithfully perform the duties of his office, and file said oath with the secretary of state, together with his official bond, in the penal sum of ten thousand dollars, said bond to be signed by sureties approved by the secretary of state and conditioned upon the faithful discharge of the

duties of his office and for delivering to his successor, or other officer authorized by the governor to receive the same, all moneys, books, instruments and other property belonging to the state then in his possession or under his control, or with which he may be legally chargeable as such state engineer.

[Laws 1889, p. 371, § 1.]

3322. General duties of state engineer.

SEC. 158. The state engineer shall have general supervising control over the public waters of the state. He shall make or cause to be made careful measurements of the flow of the public streams of the state from which water is diverted for any purpose, and compute the discharge of the same. He shall also collect all necessary data and information regarding the location, size, cost and capacity of dams and reservoirs hereafter to be constructed, and like data regarding the feasibility and economical construction of reservoirs on eligible sites, of which he may obtain information, and the useful purposes to which the water from the same may be put. He shall also collect all data and information regarding the snow-fall in the mountains each season, for the purpose of predicting the probable flow of water in the streams of the state, and publish the same.

[Laws 1889, p. 372, § 2.]

[Duties appertaining to reservoirs. Sections 3205-3214.]

[Report of engineer on desert land projects. Section 5145.]

3323. Shall approve designs and plans.

SEC. 159. The state engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments which are built within the state, which equal or exceed ten feet in vertical height.

[Laws 1889, p. 372, § 3.]

[Office of division superintendent abolished and division engineers provided in their place. Section 3335.]

3324. Supervision over division engineers and water commissioners.

SEC. 160. The state engineer shall have general charge over the work of the division water superintendents and district water commissioners, and shall furnish them with all the data and information necessary for the proper and intelligent discharge of the duties of their offices, and shall require them to report to him at suitable times their official actions, and require of them annual statements, on blanks to be furnished by him, of the

amount of water diverted from the public streams in their respective divisions and districts, and such other statistics as, in the judgment of the state engineer, will be of benefit to the state.

[Laws 1889, p. 373, § 4.]

3325. Additional duties of engineer.

SEC. 161. The state engineer shall, without any extra pay or compensation beyond the salary provided in section one of this act, perform all duties imposed upon him by law, and shall when called upon by the governor, give his counsel and services, without extra pay or compensation, to any state department or institution; *Provided, however*, That he shall be allowed all actual traveling and other necessary expenses, and the actual cost of preparing necessary maps and drawings, which actual expenses shall be paid by the department or institution requiring his services.

[Laws 1889, p. 373, § 6.]

3326. Appoint deputy for special work.

SEC. 162. The state engineer shall, on request of any party interested and on payment of his per diem charges and reasonable expenses, appoint a deputy to measure, compute and ascertain all necessary data of any canal, dam, reservoir or other construction, as required or as may be desired to establish court decrees, or for filing statements, in compliance with law, in the county clerk's records.

[Laws 1889, p. 373, § 5.]

3327. Deputies—Appointment—Oath—Engineer liable for acts.

SEC. 163. The state engineer may appoint one or more deputies, as he may think proper, for whose official actions he shall be responsible, and may revoke such appointments at his pleasure; and he may also deputize any person to do a particular service; and the said state engineer and his sureties shall be responsible on his official bond for the default or misconduct of his deputies. Such appointment and revocation shall be in writing, under the signature and official seal of the state engineer, and shall be filed in the office of the secretary of state. All persons appointed shall take and subscribe to an oath, before the judge of a court of record, to truly perform the duties of the office to which he is appointed; and such oath shall be filed with his appointment in the office of the secretary of state. In addition to the deputies provided for in this section, the state engineer may employ such

assistance in performing the work of his office as he may deem necessary.

[Laws 1889, p. 373, § 7.]

3328. Pay of deputies and assistants.

SEC. 164. The pay of the deputies and assistants of the state engineer shall not exceed the sum of six dollars per day for each day employed, together with actual expenses, and the whole amount which may be so expended is hereby limited to the sum of forty-five hundred dollars each year.

[Laws 1889, p. 374, § 8.]

3329. Require owners of ditches to construct and maintain a measuring weir.

SEC. 165. For the more accurate and convenient measurement of any water appropriated pursuant to any judgment or decree rendered by any court establishing the claims of priority of any ditch, canal or reservoir, the owners thereof may be required by the state engineer to construct and maintain, under the supervision of the state engineer, a measuring weir or other device for measuring the flow of the water at the head of such ditch, canal or reservoir, or as near thereto as practicable. The state engineer shall compute, and arrange in tabular form, the amount of water that will pass such weir or measuring device at the different stages thereof, and he shall furnish a copy of a statement thereof to any water superintendents or commissioners having control of such ditch, canal or reservoir.

[Laws 1889, p. 374, § 9.]

3330. Cubic foot per second, unit of measurement.

SEC. 166. The state engineer shall use in all his calculations, measurements, records and reports, the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as the unit of measurement of volume.

[Laws 1889, p. 374, § 10.]

[Cubic inch of water defined. Section 7026.]

3331. Report of state engineer.

SEC. 167. The state engineer shall prepare and render to the governor a full and true report of his work, regarding all matters and duties devolving upon him by virtue of his office, which report shall be delivered at the time when the reports of other state officers are required by law to be made, in order that it may be laid before the general assembly at each regular session thereof.

[Laws 1889, p. 374, § 11.]

[Act of 1889, sections 3321-3331, repealed, G. S., sections 1807-1813.]

3332. Fees collected by state engineer.

SEC. 168. Fees shall be collected by the state engineer for work done in his office as follows:

For the examination and filing of each map and statement describing a claim or claims to a water right, \$10.00 if the amount of water claimed does not exceed twenty (20) cubic feet per second and an additional \$1.00 for each cubic foot per second claimed in excess of twenty.

For the examination and filing of each map and statement describing a claim to water for storage, \$10.00 for each one thousand (1,000) acre feet or fraction thereof of storage capacity claimed.

For filing each judicial decree ordering the transfer of a water right or the change of a point of diversion, \$2.00.

For each certificate, other than those which may be required in the case of original filings of claims to water rights, requiring official signature and seal, \$1.00.

For the examination and filing of each set of plans and specifications for a reservoir, dam, embankment or other structure for the purpose of storing or utilizing water, \$1.00 for each \$1,000.00 or fraction thereof of the estimated cost of such structure or structures.

For copies of maps, \$1.00 for each hour or fraction thereof necessary for the making of such copies.

For each blue print of a tracing forming a public record, \$2.00.

For copies of records, twenty (20) cents per folio.

For rating any ditch, canal, reservoir inlet or outlet, at the request of the owner or owners thereof or of any agent or employee having control of the same, \$10.00 per day and actual expenses for each day actually and necessarily employed by the hydrographer in making such rating.

[Laws 1911, S. B. No. 537, § 1.]

[Fee for inspection of reservoir. Sections 3206 and 3211.]

3333. Fees deposited with state treasurer.

SEC. 169. At the end of each month the sum of the fees collected during the month, as provided for in section 1 of this act, shall be deposited with the state treasurer, with a complete statement showing the amounts thus received and the sources from which they are derived, and the said amounts shall be credited by the said treasurer to a fund which shall be known as a gauging fund.

[Laws 1903, p. 295, § 2.]

[Section 1 referred to is section 3232.]

3334. Application of fees.

SEC. 170. The amount credited to the gauging fund created as hereinbefore provided shall be available for the payment of expenses and salaries required for work of gauging streams, rating ditches, making seepage measurements, or other work proper and necessary to the administration of the state engineer's office. Warrants for the payment of such salaries and expenses shall be issued by the auditor of state upon presentation of vouchers properly drawn and approved by the state engineer.

[Laws 1911, S. B. No. 537, § 2.]

3334-A. State engineer record data as to water supply.

SEC. 170a. That the state engineer shall make hydrographic surveys and investigations of each stream, system and source of water supply in the state, beginning with those most used, and obtaining and recording all available data pertaining to the water supply of this state. He is hereby authorized to co-operate with the United States geological survey for this purpose.

[Laws 1909, D. 162, § 1.]

VI. IRRIGATION DIVISIONS—DIVISION ENGINEERS.

Section.

- 3335. Appointment of division engineers—Boundaries of irrigation divisions.
 - 3336. Jurisdiction of irrigation divisions Nos. 4 and 5.
 - 3337. Examination to fill vacancy.
 - 3338. Application for appointment as division engineer.
 - 3339. Qualifications of applicant.
 - 3340. Examination of papers—Rating certified to governor.
 - 3341. Term of office of division engineer.
 - 3342. Salaries and expenses of engineers.
 - 3343. Oath of office—Bond.
 - 3344. Powers and duties of engineer—Appeal from rulings.
 - 3345. Charges against water commissioner—Trial—Suspension—Removal.
 - 3346. Certified copy of priority decree furnished engineer.
 - 3347. Meeting of division engineers—Reports.
 - 3348. Report of water commissioners—Contents.
 - 3349. Clerk furnish copies of decrees to division engineer.
 - 3350. Commissioners report to engineer.
 - 3351. Owner report failure to receive water—Duty of engineer.
 - 3352. Fees of district clerk.
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3335. Appointment of division engineers—Boundaries of irrigation divisions.

SBC. 171. The office of the superintendent of irrigation is hereby declared abolished, and in place of such superintendents the governor shall, subject to confirmation by the senate, appoint an irrigation division engineer for each irrigation division now existing or which may hereafter be created. Each person so appointed shall have been a resident of Colorado for at least five (5) years, and shall have been a resident of the division, over which he shall have jurisdiction, for at least two (2) years prior to his appointment, unless there shall have been no applicant who is qualified for appointment in said division, in which case any qualified resident of any other irrigation division may be appointed. One of said officers shall have jurisdiction over irrigation division No. 1, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the South Platte river, the North Platte river, the Big Laramie

river, the North and Middle forks of the Republican river, Sandy and Frenchmans creeks, and the streams draining into the said rivers and creeks; one over irrigation division No. 2, comprising all water districts now or hereafter to be formed, consisting of lands irrigated by water taken from the Arkansas river, the South Fork of the Republican river, the Smoky Hill river and the Dry Cimarron river, and the streams draining into the said rivers; one over irrigation division No. 3, comprising all water districts now or hereafter to be formed, consisting of lands watered from the Rio Grande river and its tributaries; one over irrigation division No. 4, which is hereby created, comprising all water districts now, or hereafter, to be formed, consisting of lands in the state of Colorado watered by the San Juan river and its tributaries, and, also, all water districts now, or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries, below the mouth of Roan creek, including water district No. 42, and one over irrigation division No. 5, which is hereby created, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries above and including Roan creek and water districts Nos. 39 and 45, and, also, all water districts now, or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the Green river and its tributaries, respectively.

The office of the irrigation division engineers of the several divisions shall be located in the following cities: for division No. 1 at the state capitol building in Denver; for division No. 2 in Pueblo; for division No. 3 in Alamosa; for division No. 4 in Montrose; for division No. 5 in Glenwood Springs; for any division which may hereafter be created, in such place as may be designated by the act creating the division. The secretary of state shall provide a suitable office for each division engineer and shall supply him with suitable furniture and office equipment for the proper transaction of the business and preservation of the records of the irrigation division. Such office and equipment shall be used exclusively for the conduct of business of the state of Colorado and for no private business of any character. The office shall be open during all ordinary business hours except when the duties of the division engineer require his absence, in which instance notice of his whereabouts shall be posted at said office.

[Laws 1911, S. B. No. 531, § 1.]

3336. Jurisdiction of irrigation divisions Nos. 4 and 5.

SEC. 172. Said water districts Nos. 39 and 70 shall be and

remain in irrigation division No. 5 and said water district No. 42 shall be and remain in irrigation division No. 4.

[Laws 1905, p. 243, § 4.]

3337. Examination to fill vacancy.

SEC. 173. The state engineer shall hold examinations whenever a vacancy exists, and such examinations shall be held in at least one place in the territory comprising the division, or divisions, where any vacancy or vacancies exist, and twenty days prior to the date fixed for any such examinations he shall cause notices, for a period of one week, to be inserted in one daily paper of general circulation in any irrigation divisions where any vacancy or vacancies exist; or, if there be no daily paper, then in one weekly paper in the said division.

[Laws 1903, p. 282, § 2.]

3338. Application for appointment as division engineer.

SEC. 174. Any person desiring the appointment of irrigation division engineer may file with the state engineer a request for an examination as to his qualifications, and the state engineer shall thereupon notify the applicant of the time and place where the next examination is to be held, at which place the applicant must present himself at the time specified, prepared to take such examination.

[Laws 1903, p. 282, § 3.]

3339. Qualifications of applicant.

SEC. 175. Such examinations shall be for the purpose of determining the qualifications of applicants, and shall comprise:

First—Questions on the measurement of water, which shall include tests in the actual measurement of water in the field, on a basis of 30 per cent. of the total.

Second—Questions on the laws and customs relative to irrigation and water rights in Colorado, and including questions relating to the local conditions of the division for which the examination is being held, on a basis of 30 per cent. of the total.

Third—Questions on his experience and the extent of his practice in matters relating to the use of water in irrigation or for other beneficial purposes, on a basis of 40 per cent. of the total.

[Laws 1903, p. 283, § 4.]

3340. Examination of papers—Rating certified to governor.

SEC. 176. The state engineer shall examine and rate the examination papers of each applicant, and shall certify to the governor a list of names of all those receiving a rating of 70 per cent. or over, together with the markings of each, and from this list the governor shall, subject to confirmation by the senate, appoint persons to fill vacancies; *Provided*, That such list shall hold good for a period of two years from the date of its certification to the governor, but no longer; *And, provided, further*, That nothing herein contained shall prevent any candidate from taking later examinations for the purpose of reinstatement or of improving his rating.

[Laws 1903, p. 283, § 5.]

3341. Term of office of division engineer.

SEC. 177. Any irrigation division engineer appointed as hereinafore provided, shall hold office for a term of four years, or until his successor shall have been appointed and qualified, and shall be removed only for malfeasance in office, incompetency, or neglect of duty.

[Laws 1911, S. B. No. 531, § 2.]

3342. Salaries and expenses of engineers.

SEC. 178. The division engineer for each of divisions No. 1 and No. 2 shall receive a salary of two thousand five hundred dollars (\$2,500) per annum, and the division engineer for each of divisions No. 3, No. 4 and No. 5 shall receive a salary of one thousand five hundred dollars (\$1,500) per annum, payable monthly in equal installments, upon vouchers approved by the state engineer, drawn upon the auditor of state, by whom warrants shall be drawn upon the state treasurer therefor. He shall also receive reimbursement for all actual and necessary expenses incurred in the performance of his duties, which expenses shall not exceed the sum of five hundred (\$500.00) dollars per annum, and such expenses shall be paid monthly upon vouchers, approved by the state engineer, drawn upon the auditor of state by whom warrants shall be drawn upon the state treasurer therefor.

[Laws 1911, S. B. No. 531, § 3.]

3343. Oath of office—Bond.

SEC. 179. Before entering upon the duties of his office the irrigation division engineer shall subscribe to an oath before the

judge of a court of record that he will faithfully perform the duties of his office, and shall file said oath with the secretary of state, together with his official bond in the penal sum of five thousand (5,000) dollars, said bond to be signed by sureties approved by the secretary of state, and conditioned upon the faithful discharge of the duties of his office and for delivery to his successor or to the state engineer, upon demand, all moneys, books, instruments and other property belonging to the state or to the irrigation divisions under his control.

[Laws 1903, p. 284, § 8.]

3344. Powers and duties of engineer—Appeal from rulings.

SEC. 180. The duties of the irrigation division engineer shall be as follows: He shall be governed by all acts heretofore enacted relative to superintendents of irrigation and shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws of the state relative to the distribution of water, in accordance with the right of priority of appropriation, as established by judicial decrees.

He shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force, but for the better discharge of his duties, he shall have the authority to make such other regulations to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division; *Provided*, Such regulations shall not be in violation of any part of this act, or other laws of the state, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto.

Any person, ditch company, or ditch owner, who may deem himself injured or discriminated against by any such order or regulation of such irrigation division engineer shall have the right to appeal from the same to the state engineer, by filing with the state engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The state engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by way of affidavits, and through the irrigation division engineer shall have power to suspend, amend or confirm the order complained of.

He shall have the right to call out any water commissioner of any water district within his division, at any time he may

deem it necessary, and he shall have the power to perform the regular duties of water commissioner in all districts within his division.

Each irrigation division engineer shall devote his entire time to the work of his office and in stream measurement, ditch and canal rating, examination of ditches and reservoirs, collection of information relating to the supply and use of water, proper preservation and indexing of data and records and any other duties which may be of him required by law or directed by the state engineer, or which will tend to facilitate and improve the distribution and use of water within his division. He shall require the water commissioners to make annual reports as required by law, on or before the 15th day of November of each year. All records and data collected by the division engineer shall be the property of the state of Colorado and shall be open to public examination and use during all business hours, except when necessarily absent as in section 1 of this act provided, and it shall be unlawful for any division engineer to engage in any private engineering practice and he shall not hold or perform the duties of any other business or other office.

[Laws 1911, S. B. No. 531, § 4.]

[Duties of superintendent of irrigation are defined in L. '87, p. 295, and so far as not superseded are found in this compilation as sections 3349-3352.]

3345. Charges against water commissioner—Trial—Suspension—Removal.

SEC. 181. Charges made against any water commissioner for malfeasance in office, neglect of duty, or incompetency to fulfill the duties incumbent upon him, shall be made to the division engineer in writing, setting forth the specific charges against him, who shall hold a fair and impartial trial, after five days' notice to such water commissioner, upon whom a written copy of the charges shall be served. At such trial such water commissioner shall be permitted to appear in person and by counsel, and introduce evidence. Should such water commissioner be found guilty of any of the offenses charged, then, and in that case only, the irrigation division engineer having jurisdiction is hereby empowered to suspend him. All such investigations shall be tried and determined within five days from the date set for trial, and at which trial all oral testimony shall be reduced to writing; *Provided*, That either party may take depositions anywhere in the state and may have them read at said trial by giving the opposite party twenty-four hours' notice of the time and place and names of the parties whose depositions will thus be taken.

Upon such suspension the division engineer shall, within ten days, file all pleadings, papers and testimony with the state engineer for review; whereupon the state engineer shall appoint a competent deputy to at once assume control of the district of the water commissioner so suspended. The said deputy shall retain such control until the disability of the commissioner is removed or a new commissioner is appointed and qualified, and the said deputy shall be paid for his services from the state engineer's assistants' fund. The state engineer shall review the action of the division engineer as expeditiously as possible, and within thirty days from the time of receiving such papers, shall submit his findings to the governor for his action.

In case such suspension of any water commissioner be recommended to be made permanent by the state engineer in his findings, the governor shall, upon the recommendation of the board or boards of county commissioners, as provided by law, forthwith appoint some suitable and competent person to fill such vacancy.

The person or corporation making any such charges against any water commissioner shall furnish a good and responsible bond in such reasonable sum as may be fixed by the division engineer, conditioned for the payment of the reasonably necessary expenses incurred by the water commissioner in case the charges preferred against him are not sustained by the division engineer.

All division engineers shall be under the control and supervision of the state engineer, and may have charges preferred against them in the same manner, and such charges may be heard and determined by the state engineer upon the same conditions herein provided for like proceedings against the water commissioner.

[Laws 1903, p. 235, § 10.]

3346. Certified copy of priority decrees furnished engineer.

SEC. 182. The clerk of any court in this state issuing judicial decrees fixing the priorities of appropriation of water for irrigation and other beneficial purposes in any of such divisions, shall within ten days after such decrees have been entered, forward by registered mail one certified copy of said decree to the state engineer, and one certified copy to the irrigation division engineer having jurisdiction over the water district in which said decree shall have been entered, as heretofore provided by law in the case of superintendents of irrigation. Immediately upon receipt of said certified copies of such decrees, both the state engineer and said division engineers shall promptly file and preserve the same

among the official records in the office of each said officials and such division and state engineers shall make a tabulated statement of such decrees, in uniform books to be prepared for such purpose by the state engineer.

[Laws 1911, S. B. No. 531, § 5.]

3347. Meetings of division engineers—Reports.

SEC. 183. There shall be held in the office of the state engineer in November of each year a meeting of the irrigation division engineers and of the state engineer and his chief assistant, at which meeting the reports of the irrigation division engineers shall be presented and a general discussion had of the matters which have transpired during the previous season, and at which a program of the work for the ensuing season shall be discussed and determined upon.

The reports filed with the state engineer shall include all correspondence for the season on all business and official acts for the season last past, and shall include the reports of the water commissioners, as hereinafter defined, and other data and information.

[Laws 1903, p. 287, § 12.]

3348. Report of water commissioners—Contents.

SEC. 184. It shall be the duty of each irrigation division engineer to prepare and tabulate the reports of the water commissioners in his division, which reports shall contain a statement of the actual carrying capacity and the amount of water actually carried by each ditch or canal in his district for each and every day when water was being so carried, the total number of acres lying under each ditch or canal and the number of acres actually irrigated therefrom. It shall also contain a statement of the kind of crops and the acreage under each decreed ditch or canal, the amount of water stored in each reservoir, the amount used therefrom, with the dates of such storage and use, and the same shall be on blanks, or in books, prepared for that purpose and furnished by the state engineer. They shall contain a written statement of the official acts of the commissioners, and other matters of interest and use, and shall be duly subscribed and sworn to and filed with the irrigation division engineer on or before the 15th day of November of each year.

[Laws 1903, p. 287, § 13.]

3349. Clerk furnish copies of decrees to division engineer.

SEC. 185. Within thirty days after his appointment, said superintendent of irrigation shall send to the clerk of the district court, within his division, of such counties as have had rendered by the district court of such county, judicial decrees, fixing the priorities of appropriation of water for irrigation purposes for any water district, a notification of his appointment to such office, and shall request of the said clerk a certified copy of every decree of the district court establishing priorities of appropriation of water used for irrigation purposes within that district. Thereupon, it shall be the duty of such clerk, within ten days after the receipt of such request from said superintendent of irrigation, to prepare a certified copy of all decrees of such district court establishing priorities of water rights made within that district, under the provisions of the general statutes of the state of Colorado, and transmit the same to the superintendent of irrigation requesting it. Said superintendent of irrigation shall then cause to be prepared a book to be entitled, "The Register of Priorities of Appropriations of Water Rights for Water Division No., State of Colorado," within which he shall enter and preserve such certified copies of decrees. Said superintendent of irrigation shall, from such certified copies of decrees, make out a list of all the ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals or reservoirs may bear within their respective water districts. Said superintendent of irrigation shall make from his register a tabulated statement of all the ditches, canals and reservoirs in his division whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal and reservoir arranged in separate columns. The name of the ditch, canal or reservoir; its number in his division; the district in which it is situated; the number of it in its proper district; and the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty. In case any decrees of court establishing priorities of appropriation of water for irrigation purposes are made after the transmittal of the copy of previous decrees to the superintendent of irrigation, it shall be the duty of the clerk of the court wherein such decree is rendered, to transmit to the superintendent of irrigation of the division within which said county is situated, within ten days after it is rendered, a copy of such decree, and the super-

intendent of irrigation shall enter the same in his register, such register to be filed and kept in the office of the state engineer.

[Laws 1887, p. 297, § 7.]

[Division engineers succeeded the superintendent of irrigation. See section 3335.]

3350. Commissioners report to engineers.

SEC. 186. All water commissioners shall make reports to the superintendent of irrigation of their division as often as may be deemed necessary by said superintendent. Said reports shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of that district; the amount of water actually coming into the district to supply such ditches, canals and reservoirs; whether such supply is on the increase or decrease; what ditches, canals or reservoirs are at that time without their proper supply; the probability as to what the supply will be during the period before the next report will be required, and such other and further information as the superintendent of irrigation of that division may suggest. Said superintendent of irrigation shall carefully file and preserve such reports, and shall, from them, ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water; and if it shall appear that in any district in that division any ditch, canal or reservoir is receiving water whose priority post-dates that of the ditch, canal or reservoir in another district, as ascertained from his register, he shall at once order such post-dated ditch, canal or reservoir shut down and the water given to the elder ditch, canal or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals and reservoirs may be located. The reports of water commissioners by the superintendents of irrigation shall be filed and kept in the office of the state engineer.

[Laws 1887, p. 297, § 9.]

[Division engineers succeeded the superintendent of irrigation. See section 3335.]

3351. Owner report failure to receive water—Duty of engineer.

SEC. 187. In case any ditch, canal or reservoir, in any district within such superintendent of irrigation's division, shall fail to receive its regular supply of water, the owner or controller of such ditch, canal or reservoir may report such fact to the water

commissioner of that district, who shall immediately apportion the water in his district, and send forthwith by telegram, if necessary, a report of such fact to the superintendent of irrigation of his division, and thereupon it shall be the duty of said superintendent to compare such report with his register, and if any ditch, canal or reservoir of any other district of his division is receiving water to which any ditch, canal or reservoir of any other district is entitled, he shall at once order the shutting down of the post-dated ditches, canals or reservoirs, and the water given to the ditches, canals or reservoirs having the priority of appropriation; *Provided, however,* That nothing in this act shall be construed as interfering with the priority of water for domestic use.

[Laws 1887, p. 299, § 10.]

3352. Fees of district clerk.

SEC. 188. The expenses and salary of the superintendents of irrigation shall be paid pro rata by the counties interested, in the same manner as the fees of water commissioners are paid, and the fees of the clerks of the district courts, for services rendered under the provisions of this act, shall also be paid by the counties interested, upon the said clerk rendering his account, certified by the district judge to the boards of county commissioners of the counties embraced in the water divisions in case of which the services have been rendered.

[Laws 1887, p. 299, § 11.]

[The division engineers' salaries are provided for in section 3342.]

VII. WATER DISTRICTS—WATER COMMISSIONERS.

A. BOUNDARIES OF WATER DISTRICTS.—3353—3426.

B. WATER COMMISSIONERS.—3427—3439.

A. BOUNDARIES OF WATER DISTRICTS.

Section.

- 3353. Lands watered constitute districts.
- 3354. District number one.
- 3355. District number two.
- 3356. District number three.
- 3357. District number four.
- 3358. District number five.
- 3359. District number six.
- 3360. District number seven.
- 3361. District number eight.
- 3362. District number nine.
- 3363. District number ten—New districts formed by governor.
- 3364. District number eleven.
- 3365. District number twelve.
- 3366. District number thirteen.
- 3367. District number fourteen.
- 3368. District number fifteen.
- 3369. District number sixteen.
- 3370. District number seventeen.
- 3371. District number eighteen.
- 3372. District number nineteen.
- 3373. District number twenty.
- 3374. District number twenty-one.
- 3375. District number twenty-two.
- 3376. District number twenty-three.
- 3377. District number twenty-four.
- 3378. District number twenty-five.
- 3379. District number twenty-six.
- 3380. District number twenty-seven.
- 3381. District number twenty-eight.
- 3382. District number twenty-nine.
- 3383. District number thirty.
- 3384. District number thirty-one.
- 3385. District number thirty-two.
- 3386. District number thirty-three.
- 3387. District number thirty-four.
- 3388. District number thirty-five.
- 3389. District number thirty-six.
- 3390. District number thirty-seven.
- 3391. District number thirty-eight.
- 3392. District number thirty-nine.
- 3393. District number forty.
- 3394. District number forty-one.

- 3395. District number forty-two.
 - 3396. Same.
 - 3397. District number forty-three.
 - 3398. District number forty-four.
 - 3399. District number forty-five.
 - 3400. District number forty-six.
 - 3401. District number forty-seven.
 - 3402. District number forty-eight.
 - 3403. District number forty-nine.
 - 3404. District number fifty.
 - 3405. District number fifty-one.
 - 3406. District number fifty-two.
 - 3407. District number fifty-three.
 - 3408. District number fifty-four.
 - 3409. District number fifty-five.
 - 3410. District number fifty-six.
 - 3411. District number fifty-seven.
 - 3412. District number fifty-eight.
 - 3413. District number fifty-nine.
 - 3414. District number sixty.
 - 3415. District number sixty-one.
 - 3416. District number sixty-two.
 - 3417. District number sixty-three.
 - 3418. District number sixty-four.
 - 3419. District number sixty-five.
 - 3420. District number sixty-six.
 - 3421. District number sixty-seven.
 - 3422. District number sixty-eight.
 - 3423. District number sixty-nine.
 - 3424. District number seventy.
 - 3425. Same—Expenses of commissioner.
 - 3426. Jurisdiction of courts over district.
-

3353. Lands watered constitute districts.

SEC. 189. That the lands now irrigated, or which may be hereafter irrigated from ditches now taking water from the following described rivers or natural streams of the state of Colorado, are hereby declared to constitute irrigation districts.

[G. S., § 1741; Laws 1879, p. 97, § 5.]

[Unlawful to cut trees which conserve snow or water in irrigation district. Section 2626.]

3354. District number one.

SEC. 190. That water district No. 1 shall consist of all lands in the state of Colorado irrigated by waters taken from that portion of the South Platte river between the mouth of the Cache la Poudre river and the west boundary line of Washington county, and from the streams draining into the said portion of the South Platte river.

[Laws 1889, p. 212, § 13; amending Laws 1887, p. 303, § 1; which amended G. S., § 1742; Laws 1879, p. 97, § 6.]

3355. District number two.

SEC. 191. That district No. 2 shall consist of land irrigated from ditches taking water from the South Platte river and its tributaries, except Big Thompson, St. Vrain and Clear Creek, between the mouth of the Cache la Poudre and the mouth of Cherry Creek.

[G. S., § 1743; Laws 1879, p. 97, § 7.]

3356. District number three.

SEC. 192. That district No. 3 shall consist of all lands irrigated from ditches taking water from the Cache la Poudre and its tributaries.

[G. S., § 1744; Laws 1879, p. 98, § 8.]

3357. District number four.

SEC. 193. That district No. 4 shall consist of all lands irrigated from ditches taking water from the Big Thompson and its tributaries.

[G. S., § 1745; Laws 1879, p. 98, § 9.]

3358. District number five.

SEC. 194. That district No. 5 shall consist of all lands irrigated from ditches taking water from the St. Vrain creek and its tributaries, except the Boulder, its tributaries, and Coal creek.

[G. S., § 1746; Laws 1879, p. 98, § 10.]

3359. District number six.

SEC. 195. That district No. 6 shall consist of all lands irrigated from ditches taking water from the Boulder and its tributaries, and Coal creek.

[G. S., § 1747; Laws 1879, p. 98, § 11.]

3360. District number seven.

SEC. 196. That district No. 7 shall consist of all lands irrigated from ditches taking water from Clear creek and its tributaries.

[G. S., § 1748; Laws 1879, p. 98, § 12.]

3361. District number eight.

SEC. 197. That water district No. 8 shall consist of all lands irrigated by ditches taking water from Cherry creek, Plum creek

and Platte river and their tributaries, except Bear creek, above water district No. 2, and below the forks of the north and south branches of the South Platte river, and including all lands and ditches in Douglas County.

[Laws 1899, p. 430, § 1; amending G. S., § 1749; Laws 1879, p. 98, § 13.]

3362. District number nine.

SEC. 198. That district No. 9 shall consist of all lands irrigated by ditches taking water from Bear creek and its tributaries.

[G. S., § 1750; Laws 1879, p. 98, § 14.]

3363. District number ten—New districts to be formed by governor.

SEC. 199. That district No. 10 shall consist of all lands irrigated from ditches taking water from the Fountain and its tributaries: *Provided*, That said district shall not extend beyond the limits of El Paso county.

Other irrigation districts may be formed from time to time by the governor, on petition of parties interested.

[G. S., § 1751; Laws 1879, p. 98, § 15.]
[The title of the act of April 1, 1885, L. '85, p. 256 purports to amend the above section.]

3364. District number eleven.

SEC. 200. Water district No. 11 shall consist of all lands irrigated by water taken from that portion of the Arkansas river above water district No. 12, and from streams draining into the said portion of the Arkansas river.

[Laws 1889, p. 369, § 1; amending Laws 1885, p. 256, § 4.]

3365. District number twelve.

SEC. 201. That district No. 12 shall consist of all lands irrigated from ditches or canals taking water from that part of the Arkansas river lying in Fremont county; also, lands irrigated from ditches or canals taking water from the tributaries of said portion of the Arkansas river, except Texas creek and its tributaries, and that part of Grape creek which lies above the south line of said Fremont county.

[Laws 1895, p. 198, § 1; amending Laws 1893, p. 301, § 1; which amended Laws 1885, p. 257, § 5.]

3366. District number thirteen.

SEC. 202. That district No. 13 shall consist of all lands irrigated from ditches or canals taking water from Texas creek and its

tributaries and that part of Grape creek and its tributaries lying in Custer county.

[Laws 1895, p. 198, § 2.]

3367. District number fourteen.

SEC. 203. Water district No. 14 shall consist of all lands irrigated by water taken from that portion of the Arkansas river situated within the boundaries of Pueblo county and from the streams draining into the said portion of the Arkansas river, except the St. Charles and Huerfano rivers and their tributaries, and except also that portion of the Fountain embraced in water district No. 10, and the streams draining into the said portion of the Fountain.

[Laws 1889, p. 370, § 2.]

3368. District number fifteen.

SEC. 204. That district No. 15 shall consist of all lands irrigated from ditches, or canals, taking water from the St. Charles and its tributaries.

[Laws 1885, p. 257, § 8.]

3369. District number sixteen.

SEC. 205. That district No. 16 shall consist of all lands irrigated from ditches and canals taking water from the Huerfano and its tributaries.

[Laws 1885, p. 257, § 9.]

3370. District number seventeen.

SEC. 206. Water district No. 17 shall consist of all lands irrigated by ditches or canals taking water from that portion of the Purgatoire river north of the north boundary line of Las Animas county; and all lands irrigated by ditches or canals taking water from that portion of the Arkansas river below water district No. 14, and above the mouth of the Purgatoire river, and from the streams running into the said portion of the Arkansas river, except that portion of the Apishapa river and its tributaries, south of the south boundary line of Pueblo county.

[Laws 1909, p. 428, § 3.]

3371. District number eighteen.

SEC. 207. Water district No. 18 shall consist of all lands irrigated by ditches or canals, taking water from that portion of the

Apishapa river and its tributaries, south of the south boundary line of Pueblo county.

[Laws 1909, p. 428, § 1.]

3372. District number nineteen.

SEC. 208. Water district No. 19 shall consist of all lands irrigated by ditches or canals, taking water from that portion of the Purgatoire river and its tributaries, south of the north boundary line of Las Animas county.

[Laws 1909, p. 428, § 2.]

3373. District number twenty.

SEC. 209. Water district No. 20 shall consist of all lands irrigated by water taken from that portion of the Rio Grande above the mouth of the Rio Conejos, and from the streams draining into the said portion of the Rio Grande, including Piedra, Spring, Gato and San Francisco creeks, and all other streams that would in time of flood flow into the said portion of the Rio Grande, although at ordinary stages the waters thereof might not flow upon the surface to the Rio Grande, except Alamosa river and its tributaries and the La Jara and Trinchera creeks and their tributaries; *Provided*, That nothing in this act shall be construed as inconsistent with the provisions of the acts creating water districts numbered twenty-five, twenty-six and twenty-seven.

[Laws 1889, p. 218, § 1; amending Laws 1887, p. 301, §§ 1 and 2, which amended Laws 1885, p. 258, §§ 13 and 16.]

3374. District number twenty-one.

SEC. 210. That district No. 21 shall consist of all lands irrigated from ditches or canals taking water from the Alamosa and La Jara creeks and their tributaries.

[Laws 1885, p. 258, § 14.]

3375. District number twenty-two.

SEC. 211. That district No. 22 shall consist of all lands in the state of Colorado irrigated from ditches or canals taking water from Conejos creek and its tributaries.

[Laws 1885, p. 258, § 15.]

3376. District number twenty-three.

SEC. 212. Water district No. 23 shall consist of all lands in the state of Colorado being, or to be, irrigated from ditches

or canals taking water from the South Platte river, and from any of its direct, or indirect, tributaries, at any point or points above water district No. 8, in the said state, and all lands upon the tributaries of the Arkansas river which lie within the boundaries of Park county.

[Laws 1899, p. 431, § 1; amending Laws 1889, p. 212, § 9.]

3377. District number twenty-four.

SEC. 213. Water district No. 24 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Rio Grande between the mouth of the Rio Conejos and the Colorado state line, from the streams draining into the said portion of the Rio Grande and from Costilla creek, and the streams draining into Costilla creek.

[Laws 1885, p. 259, § 17.]

3378. District number twenty-five.

SEC. 214. That water district No. 25 shall consist of all lands irrigated by water taken from the San Luis creek and all its tributaries.

[Laws 1899, p. 237, § 1.]

3379. District number twenty-six.

SEC. 215. That district No. 26 shall consist of all lands irrigated from ditches, or canals, taking water from the Saguache creek and its tributaries.

[Laws 1885, p. 258, § 19.]

3380. District number twenty-seven.

SEC. 216. That district No. 27 shall consist of all the lands irrigated from ditches, or canals, taking water from Tuttle, Carnero, La Garita, and all other creeks, and their tributaries, which have their sources of water supply in the La Garita mountains and flow eastward into the San Luis valley.

[Laws 1885, p. 258, § 20.]

3381. District number twenty-eight.

SEC. 217. That district No. 28 shall consist of all lands irrigated from ditches, or canals, taking water from the Tomichi and its tributaries.

[Laws 1885, p. 259, § 21.]

3382. District number twenty-nine.

SEC. 218. That district No. 29 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from that part of the San Juan river, and its tributaries, which lie above the junction of the San Juan river and the Rio Piedra, and including the Rio Piedra.

[Laws 1885, p. 259, § 22.]

3383. District number thirty.

SEC. 219. That district No. 30 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from that part of the Rio Las Animas river, and its tributaries, which lie in Colorado.

[Laws 1885, p. 259, § 23.]

3384. District number thirty-one.

SEC. 220. That district No. 31 shall consist of all lands in the state of Colorado irrigated from ditches, or canals, taking water from that part of the Los Pinos river, and its tributaries, which lie in Colorado.

[Laws 1885, p. 259, § 24.]

3385. District number thirty-two.

SEC. 221. Water district No. 32 shall consist of all lands in the state of Colorado irrigated by water taken from those natural streams which drain into the San Juan river, and are not included in water districts numbers, 29, 30, 31, 33 and 34.

[Laws 1889, p. 371, § 6; amending Laws 1885, p. 259, § 25.]

3386. District number thirty-three.

SEC. 222. That district No. 33 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from the La Plata river, and its tributaries, which lie in Colorado.

[Laws 1885, p. 259, § 26.]

3387. District number thirty-four.

SEC. 223. That water district No. 34 shall consist of all lands lying in the state of Colorado, irrigated from ditches or canals taking water from the Rio Mancos, and its tributaries; and also all lands irrigated from ditches or canals taking water from that

part of the Dolores river within the boundaries of said Montezuma county, and from streams draining into said portion of Dolores river.

[Laws 1897, p. 175, § 1; amending Laws 1885, p. 259, § 27.]

3388. District number thirty-five.

SEC. 224. That water district No. 35 shall consist of all lands lying in the county of Costilla, in this state, watered by the Trinchera creek, Sand or Medano creek, Big Spring creek, Little Spring creek, Mosca creek, North and South Zapato creeks, Sierra Blanca creek, and all streams draining into the said creeks, and all other streams between said Trinchera creek and said Sand or Medano creek.

[Laws 1899, p. 237, § 2; amending Laws 1887, p. 307, § 1.]

3389. District number thirty-six.

SEC. 225. That district No. 36 shall consist of all the lands irrigated from water taken from the Blue river and its tributaries.

[Laws 1887, p. 313, § 3.]

3390. District number thirty-seven.

SEC. 226. That district No. 37 shall consist of lands all lying in the state of Colorado irrigated by waters taken from the Eagle river and its tributaries.

[Laws 1887, p. 313, § 4.]

3391. District number thirty-eight.

SEC. 227. That district No. 38 shall consist of all the lands lying in the state of Colorado irrigated by waters taken from the Roaring Fork river and its tributaries.

[Laws 1887, p. 313, § 5.]

3392. District number thirty-nine.

SEC. 228. The boundaries of water district No. 39 are hereby defined to include all the tributaries of Grand river on the north side thereof, from the mouth of the Roaring Fork river, westerly to the state line; and shall consist of all lands lying in the state of Colorado, irrigated by any and all such tributaries, excepting Roan creek, and its tributaries, and all lands irrigated thereby; and excepting also all lands lying in Mesa county. The said water district No. 39 shall include only all the lands in Garfield county,

above described, and which are not irrigated from Roan creek or any of its tributaries.

[Laws 1905, p. 243, § 1; amending Laws 1887, p. 314, § 6.]

[For jurisdiction of district court over district No. 39, see section 3426.]

3393. District number forty.

SEC. 229. That water district No. 40 shall consist of all lands irrigated from ditches taking water from Crystal creek and Smith's fork, Escalante creek, and their tributaries, all lands lying within the boundaries of Delta county irrigated from the Gunnison river and its tributaries, (except lands irrigated from the Uncompahgre river and its tributaries), and all lands in the county of Delta and the county of Gunnison irrigated by ditches taking their water from the north fork of the Gunnison river and its tributaries.

[Laws 1903, p. 296, § 1; amending Laws 1887, p. 311, § 2.]

3394. District number forty-one.

SEC. 230. That district No. 41 shall consist of all lands irrigated from ditches or canals taking water from the Uncompahgre river and its tributaries, except so much as are within the boundary lines of Ouray county.

[Laws 1887, p. 311, § 3.]

3395. District number forty-two.

SEC. 231. That district No. 42 shall consist of all lands irrigated from ditches and canals taking water from the Grand and Gunnison rivers and their tributaries within the county of Mesa, except Escalante creek.

[Laws 1903, p. 296, § 2; amending Laws 1887, p. 311, § 4.]

3396. Same.

SEC. 232. The boundaries of water district No. 42 shall not be construed to include any land hereinabove embraced in either of said water districts, 39 or 70.

[Laws 1905, p. 243, § 3.]

[For attachment of district 42 for adjudication of priorities, see section 3426.]

3397. District number forty-three.

SEC. 233. That water district No. 43 is hereby established, and shall consist of all lands irrigated by ditches taking water from the White river and its tributaries.

[Laws 1887, p. 307, § 1.]

3398. District number forty-four.

SEC. 234. That water district No. 44 shall consist of all lands irrigated by water taken from that portion of the Yampa river above the mouth of the Little Snake river and below the mouth of Fortification creek, and from the streams draining into the said portion of the Yampa river.

[Laws 1889, p. 211, § 2.]

3399. District number forty-five.

SEC. 235. That water district No. 45 shall consist of all lands situated on the south side of the Grand river and irrigated from ditches or canals taking water from the Grand river and its tributaries, between the mouth of Roaring Fork river and the north line of Mesa county.

[Laws 1889, p. 213, § 17.]

3400. District number forty-six.

SEC. 236. That water district No. 46 shall consist of all lands irrigated by water taken from that portion of the North Platte river above the mouth of Michigan creek, and from the streams draining into the said portion of the North Platte river.

[Laws 1889, p. 212, § 10.]

3401. District number forty-seven.

SEC. 237. That water district No. 47 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the North Platte river between water district No. 46 and the state line of Colorado, and from the streams draining into the said portion of the North Platte river, and from Granite and Encampment creeks and the streams draining into the said creeks.

[Laws 1889, p. 212, § 11.]

3402. District number forty-eight.

SEC. 238. That water district No. 48 shall consist of all lands in the state of Colorado irrigated by water taken from the Big Laramie river and from the streams draining into the said river.

[Laws 1889, p. 212, § 12.]

3403. District number forty-nine.

SEC. 239. That water district No. 49 shall consist of all lands in the state of Colorado irrigated by water taken from the south

fork of the Republican river and the Smoky Hill river, and the streams draining into the said rivers.

[Laws 1889, p. 471, § 1.]

3404. District number fifty.

SEC. 240. That water district No. 50 shall consist of all lands irrigated by water taken from the Muddy and Troublesome creeks, and from the streams draining into the said creeks.

[Laws 1889, p. 213, § 18.]

3405. District number fifty-one.

SEC. 241. That water district No. 51 shall consist of all lands irrigated by water taken from the Grand river above the mouth of the Blue river, and from the streams draining into the said portion of the Grand river, except the Muddy and Troublesome creeks and the streams draining into the said creeks.

[Laws 1889, p. 213, § 19.]

3406. District number fifty-two.

SEC. 242. That water district No. 52 shall consist of all lands on the south side of the Grand river irrigated by water taken from the Grand river below the mouth of Blue river and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river, except Eagle river and its tributaries.

[Laws 1889, p. 213, § 20.]

3407. District number fifty-three.

SEC. 243. That water district No. 53 shall consist of all lands on the north side of the Grand river irrigated by water taken from that portion of the Grand river below the mouth of Muddy creek and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river.

[Laws 1889, p. 214, § 21.]

3408. District number fifty-four.

SEC. 244. That water district No. 54 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Little Snake river and its tributaries above the most westerly intersection of said river with the Colorado state line.

[Laws 1889, p. 211, § 3.]

3409. District number fifty-five.

SEC. 245. That water district No. 55 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Yampa river below water district No. 44, and from the streams draining into the said portion of Yampa river not included in water district No. 54.

[Laws 1889, p. 211, § 4.]

3410. District number fifty-six.

SEC. 246. That water district No. 56 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Green river embraced within the boundaries of the county of Routt, and from the streams draining into the said portion of the Green river, except the Yampa river and its tributaries.

[Laws 1889, p. 211, § 5.]

3411. District number fifty-seven.

SEC. 247. That water district No. 57 shall consist of all lands irrigated by water taken from that portion of the Yampa river above water district No. 44 and below the mouth of Elk creek, and from the streams draining into the said portion of the Yampa river.

[Laws 1889, p. 211, § 6.]

3412. District number fifty-eight.

SEC. 248. That water district No. 58 shall consist of all lands irrigated by water taken from the Yampa river above water district No. 57, and from the streams draining into the said portion of Yampa river.

[Laws 1889, p. 211, § 7.]

3413. District number fifty-nine.

SEC. 249. That water district No. 59 shall consist of all lands irrigated by water taken from the Gunnison river above the mouth of Tomichi creek, and from all streams draining into the said portion of Gunnison river; also of all lands on the north side of Gunnison river below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river.

[Laws 1889, p. 214, § 22.]

3414. District number sixty.

SEC. 250. That water district No. 60 shall consist of all

lands irrigated by water taken from the San Miguel river and from the streams draining into the said river.

[Laws 1889, p. 214, § 23.]

3415. District number sixty-one.

SEC. 251. That water district No. 61 shall consist of all lands in the state of Colorado irrigated from that portion of Dolores river between the mouth of San Miguel river and the county line of Dolores county, and from streams draining into the said portion of Dolores river.

[Laws 1889, p. 214, § 24.]

3416. District number sixty-two.

SEC. 252. That water district No. 62 shall consist of all lands south of the Gunnison river irrigated by water taken from the Gunnison river below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river.

[Laws 1889, p. 214, § 25.]

3417. District number sixty-three.

SEC. 253. That water district No. 63 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Dolores river below the mouth of the San Miguel river and from the streams draining into the said portion of the Dolores river.

[Laws 1889, p. 214, § 26.]

3418. District number sixty-four.

SEC. 254. That water district No. 64 shall consist of all lands irrigated by water taken from that portion of the South Platte river between the western boundary line of Washington county and the state line of Colorado and Nebraska, and from the streams draining into the said portion of the South Platte river.

[Laws 1889, p. 213, § 14.]

3419. District number sixty-five.

SEC. 255. That water district No. 65 shall consist of all lands in the state of Colorado irrigated by water taken from the middle and north forks of the Republican river, from Sandy and Frenchman's creeks, and the tributaries of these streams.

[Laws 1889, p. 213, § 15.]

3420. District number sixty-six.

SEC. 256. That water district No. 66 shall consist of all lands in the state of Colorado irrigated by water taken from the Dry Cimarron and the streams draining into the said river.

[Laws 1889, p. 472, § 2.]

3421. District number sixty-seven.

SEC. 257. That water district No. 67 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Arkansas river below the mouth of the Purgatoire river, and from the streams draining into the said portion of the Arkansas river.

[Laws 1889, p. 472, § 3.]

3422. District number sixty-eight.

SEC. 258. Water district No. 68 shall consist of all lands irrigated by water taken from that portion of the Uncompahgre river above water district No. 41, and from the streams draining into the said portion of the Uncompahgre river.

[Laws 1889, p. 213, § 16.]

3423. District number sixty-nine.

SEC. 259. That water district No. 69 shall consist of all lands lying in the state of Colorado irrigated from ditches or canals taking water from those portions of the Dolores river within Dolores county, and from streams draining into said portions of the Dolores river.

[Laws 1897, p. 175, § 3.]

3424. District number seventy.

SEC. 260. That water district No. 70 shall consist of all lands irrigated by water taken from Roan creek and all its tributaries situated within the counties of Garfield and Mesa, in this state, and also all lands in Mesa county situate north of Grand river and east of Roan creek.

[Laws 1905, p. 243, § 2.]

3425. Same—Expenses of commissioner.

SEC. 261. All charges of the water commissioner or his deputies, that may be appointed for said water district No. 70, shall be borne equally between the counties of Garfield and Mesa.

[Laws 1905, p. 244, § 6.]

3426. Jurisdiction of courts over districts.

SEC. 262. The district court of Garfield county shall retain and have jurisdiction over the adjudication of water rights and priorities in said water districts Nos. 39 and 70, and the district court of Mesa county shall retain and have jurisdiction of water rights and priorities in said water district No. 42.

[Laws 1905, p. 244, § 5.]

B. WATER COMMISSIONER.**Section.**

- 3427. Water commissioners—Appointment—Term of office—Bond.
- 3428. Vacancies, how filled—Removal.
- 3429. Take oath of office within ten days.
- 3430. Commissioner begin work when called on.
- 3431. Commissioner to devote entire time—Neglect.
- 3432. Duty of commissioner—Open and shut headgates.
- 3433. Powers of commissioner—Commissioner subordinate to state and division engineers.
- 3434. Pay of commissioner—Accounts—District in two counties.
- 3435. Deputy commissioner—Appointment—Salary.
- 3436. Commissioner may employ assistance—Salary.
- 3437. Accounts kept of assistants' time.
- 3438. Commissioner inspect ditches—Waste of water.
- 3439. Failure of commissioner to perform duty—Penalty.

3427. Water commissioners—Appointment—Term of office—Bond.

SEC. 263. There shall be one water commissioner for each of the above named districts, and for each district hereafter formed, who shall be appointed by the governor, to be selected by him from persons recommended to him by the several boards of county commissioners of the counties into which water districts may extend; and the water commissioner so appointed, shall, before entering upon his duties, give a good and sufficient bond for the faithful discharge of his duties, with not less than three sureties, in a sum not less than one thousand nor more than five thousand dollars, the amount of said bond to be fixed by the county commissioners, and approved by the governor and state engineer. The commissioner so appointed shall hold his office until his successor is appointed and qualified; *Provided, however,* That if such water district shall be embraced in more than one county, and the several counties in which such water district is situated, dis-

agree as to the amount of the bond as herein required of water commissioners, then and in that event the governor shall fix the amount thereof, with the same effect as though fixed by the county commissioners.

[Laws 1887, p. 302, § 1.]

3428. Vacancies, how filled—Removal.

SEC. 264. The governor shall, by like selection and appointment, fill all vacancies which may be occasioned by death, resignation or continued absence from the district, removal, or otherwise. Said county commissioners may, from time to time, recommend persons to be appointed as above provided, and the governor may, at any time, remove any water commissioner, in his discretion.

[Laws 1887, p. 303, § 2.]

3429. Oath of office within ten days.

SEC. 265. That within ten days after his appointment, and before entering upon the duties of his office, such water commissioner shall take and subscribe the oath of office prescribed by the constitution of this state.

[Laws 1879, p. 99, § 17.]

3430. Commissioner begin work when called on.

SEC. 266. Said water commissioners shall not begin their work until they shall be called on by two or more owners or managers or persons controlling ditches in their several districts by application in writing stating that there is necessity for their action; and they shall not continue performing services after the necessity therefor shall cease.

[Laws 1879, p. 107, § 42.]

[Penalty for failure of commissioner to act. Section 3253.]

3431. Commissioners to devote entire time—Neglect.

SEC. 267. It is hereby made the duty of the water commissioner after being called upon to distribute water, to devote his entire time to the discharge of his duties when such duties are required, so long as the necessities of irrigation in his district shall require; and it is made his duty to be actively employed on the line of the stream or streams in his water district, supervising and directing the putting in of head-gates, waste gates, keeping the stream clear of unnecessary dams or other obstructions, and

such other duties as pertain to a guard of the public streams in his water district; and for wilful neglect of his duty, he shall be liable to fifty dollars fine, with costs of suit.

[Laws 1889, p. 471, § 6.]

[Report of commissioners. Section 3348.]

3432. Duty of commissioners—Open and shut head-gates.

SEC. 268. It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream.

[G. S., § 1754; Laws 1879, p. 99, § 18.]

[When commissioner shall withdraw excess water from reservoir. Section 3208.]

3433. Powers of commissioner—Commissioner subordinate to state and division engineers.

SEC. 269. Water commissioners shall, in the discharge of their duties, be invested with the powers of constables, and may arrest any person violating his orders relative to the opening or shutting down of head gates, or the using of water for irrigation purposes, and take such offender before the nearest justice of the peace, who may, if such offender be convicted, fine him in any sum not exceeding one hundred dollars, and, in default of the payment of such fine, may imprison him in the county jail not exceeding thirty days; *Provided*, That the orders of the superintendents of irrigation in their respective divisions, and the orders of the state engineer, shall be held at all times superior to the orders of water commissioners, and shall relieve any person acting in accordance with such superior orders from the penalties herein provided; *And, provided, also*, That in like manner the orders issued by the state engineer shall be held superior to any order issued by any superintendent of irrigation.

[Laws 1889, p. 469, § 1.]

[Supervision of state engineer over commissioners. Section 3324.]

3434. Pay of commissioner—Accounts—District in two counties.

SEC. 270. The water commissioner shall be entitled to pay

at the rate of five (5) dollars per day for each day he shall actually be employed in the duties of his office, and be paid by the county or counties in which his irrigating district may lie. Each water commissioner shall keep a just and itemized account of the time spent by him in the duties of his office, and shall present a true copy thereof, verified by oath, to the board of county commissioners of the county in which his district may lie, and said board of commissioners shall allow the same; and if said irrigation district shall extend into two or more counties, then such water commissioner shall present his account for his services, verified as aforesaid, to the board of county commissioners into which his district extends, and each board of county commissioners shall pay its pro rata share thereof.

[Laws 1889, p. 470, § 2.]

[For payment of expenses of commissioner of district No. 70, see section 3426.]

3435. Deputy commissioner—Appointment—Salary.

SEC. 271. The water commissioner is hereby authorized to appoint not to exceed two deputies to speedily make the examinations provided for in section 1 of this act, who shall be entitled to the same compensation, and to be paid in the same manner as is by law provided for the payment of other deputy water commissioners.

[Laws 1895, p. 197, § 2.]

[Section 1 above referred to is section §438.]

3436. Commissioner may employ assistance—Salary.

SEC. 272. The water commissioner is hereby given power, whenever he shall deem it necessary, to employ a suitable assistant, or assistants, to aid him in the discharge of his duties; such assistant, or assistants, shall take the same oath as water commissioner, and shall obey his instructions, and shall be entitled to pay at the rate of two dollars and fifty cents (\$2.50) per day for every day they are so employed, to be paid by county commissioners upon the certificates of the water commissioners.

[Laws 1889, p. 470, § 3; amending by implication, G. S., 1757; Laws 1879, p. 107, § 41.]

3437. Accounts kept of assistant's time.

SEC. 273. Each water commissioner shall keep an itemized account of the time of each assistant by him employed, and shall certify the same to the board of county commissioners, who shall

pay such assistant, or assistants, in the same manner as provided for payment of water commissioners in section two of this act.

[Laws 1889, p. 470, § 4.]

[Section 2 referred to is section 3434.]

3438. Commissioner inspect ditches—Waste of water.

SEC. 274. The water commissioners of the several water districts of this state are hereby empowered, and it is hereby made their duty, upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners of or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully, or extravagantly or wrongfully, used by its water consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioners to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used.

[Laws 1895, p. 197, § 1.]

3439. Failure of commissioner to perform duties—Penalty.

SEC. 275. Any water commissioner who fails to perform any of the duties imposed upon him by this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof by a court of competent jurisdiction, shall be fined in a sum not less than fifty (50) dollars nor more than five hundred (500) dollars.

[Laws 1895, p. 198, § 3.]

[For bribery of water commissioner see section 1723.]

VIII. IRRIGATION DISTRICTS.

Section.

- 3440. Irrigation districts.
- 3441. Petition.
- 3442. Presentation and allowance of petition.
- 3443. Notice—Election.
- 3444. Same—Canvass of votes—Proclamation.
- 3445. Officers—Election—Bond.
- 3446. Same—Election notice.
- 3447. Same—Election officers' duties.
- 3448. Same—Canvass of votes.
- 3449. Same—Records—Vacancies and term of office.
- 3450. Board of directors—Officers—General duties—Ratio of water distribution.
- 3451. Directors—Meetings—Duties—Domain—Public use.
- 3452. Property—Title.
- 3453. Conveyances—Suits.
- 3454. Bonds—Elections.
- 3455. Bonds—Sale—Proceeds.
- 3456. Bonds—Payment—Lien.
- 3457. Board of directors—Levy.
- 3458. Assessor—Assessment.
- 3459. County commissioners.
- 3460. District treasurer.
- 3461. Assessment—Collection.
- 3462. Construction—Contracts.
- 3463. Claim—Audit—Payment—Financial report.
- 3464. Expense of organization, how defrayed.
- 3465. Crossing streams, highways, railroads, state lands, etc.
- 3466. Officers' salaries—Not interested in contracts.
- 3467. Limit of indebtedness.
- 3468. Insufficient supply—Distribution.
- 3469. Compensation for property taken.
- 3470. Boundaries—Change of—Effect.
- 3471. Contiguous territory—Annexation—Petition.
- 3472. Contiguous territory—Notice.
- 3473. Contiguous territory—Hearing.
- 3474. Payment.
- 3475. Boundaries—Orders.
- 3476. Order—Record—Effect.
- 3477. Records—Evidence.
- 3478. Legal representatives petitioners.
- 3479. Redivision of district—Election of officers.
- 3480. Exclusion of lands.
- 3481. Petition for exclusion.
- 3482. Same—Notice.
- 3483. Same—Hearing.
- 3484. Same—Orders.
- 3485. Order—Record—Effect.
- 3486. Division of district.
- 3487. Dissolution of district—Election.
- 3488. Same—Canvass—Record.
- 3489. Judicial examination and confirmation.

- 3490. Same—Petition.
 - 3491. Same—Notice of hearing.
 - 3492. Same—Answer—Pleading.
 - 3493. Same—Determination—Costs.
 - 3494. Repeal—Saving clause.
 - 3494-A. Agricultural college and school lands.
 - 3494-B. Form and requirements of petition.
 - 3494-C. Assessments.
 - 3494-D. Duties of county treasurer and register of land board.
 - 3494-E. Assessments—Accrued assessments.
 - 3494-F. Rent.
 - 3494-G. Requirements of contracts of sale.
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3440. Irrigation district.

SEC. 276. Whenever a majority of the resident freeholders owning lands in any district desire to provide for the irrigation of the same they may propose the organization of an irrigation district under the provisions of this act, and when so organized each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district; *Provided*, That where ditches, canals or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises.

[Laws 1905, p. 246, § 1.]

3441. Petition.

SEC. 277. For the purpose of the establishment of an irrigation district as provided by this act, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district; said petition shall state that it is the purpose of petitioners to organize an irrigation district, under the provisions of this act; said petition shall also contain a general description of the boundaries of such proposed district, the means proposed to supply water for the irrigation of the lands embraced therein, the name proposed for such district and shall select a committee of three of said petitioners to present such petition to the board of county commissioners as provided by law, praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the same to the vote of the qualified

electors resident within said proposed district; said petition shall be signed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the resident freeholders within the said proposed district. The said petition shall also be accompanied by a good and sufficient bond, to be approved by said board of county commissioners in double the amount of the probable cost of organizing such district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected, but in case such district is so effected, then said expenses incurred by the board of county commissioners shall be paid back to said county by said district. Such petition shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper of general circulation printed and published in the county where said petition is to be presented, together with a notice signed by the committee of said petitioners selected by the petition for that purpose giving the time and place of the presentation of the same to said board of county commissioners.

[Laws 1905, p. 246, § 2.]

3442. Presentation and allowance of petition.

SEC. 278. When such petition is presented and it shall appear that the notice of the presentation of said petition has been given as required by law, and that said petition has been signed by the requisite number of petitioners as required by this act, the commissioners shall then proceed to define the boundaries of said proposed district from said petition and from such application for the exclusion of lands therefrom and the inclusion of lands therein as may be made in accordance with the intent of this act; they may adjourn such examination from time to time not exceeding three weeks in all and shall by final order duly entered define and establish the boundaries of such proposed district; *Provided*, That said board shall not modify such proposed boundaries described in the petition so as to change the objects of said petition or so as to exempt from the operation of this act any land within the boundaries proposed by the petition susceptible to irrigation by the same system of water works applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same, *Provided, also*, That contiguous lands not included in said proposed district as described

in the petition may upon application of the owner or owners be included in such district upon such hearing.

When the boundaries of any proposed district shall have been examined and defined as aforesaid the county commissioners shall forthwith make an order allowing the prayer of said petition, defining and establishing the boundaries and designating the name of such proposed district. Thereupon the said commissioners shall by further order duly entered upon their record call an election of the qualified electors of said district to be held for the purpose of determining whether such district shall be organized under the conditions of this act, and by such order shall submit the names of one or more persons from each of the three divisions of said district as hereinafter provided to be voted for as directors therein, and for the purposes of said election shall divide said district into three divisions as nearly equal in size as may be practicable and shall provide that a qualified elector of each of said three divisions shall be elected as a member of the board of directors of said district by the qualified electors of the whole district. Each of said divisions shall constitute an election precinct and three judges shall be appointed for each of such precincts, one of whom shall act as clerk of said election; *Provided*, That in the hearing of any such petition the board of county commissioners shall disregard any informality therein, and in case they deny the same or dismiss it for any reasons on account of the provisions of this act not having been complied with, which are the only reasons upon which they shall have a right to refuse or dismiss the same, they shall state their reasons in writing therefor in detail, which shall be entered upon their records and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with this act, which writ shall be heard within twenty days from the date of its issuance, and which twenty days shall be excluded from the forty days given the commissioners herein to act upon said petition. The officers of such district shall consist of three directors, a secretary and treasurer.

[Laws 1905, p. 246, § 3.]

3443. Notice—Election.

SEC. 279. The board of county commissioners shall thereupon cause a notice embodying said orders in substance signed by the chairman of the board of county commissioners and the clerk of said board to be issued, given and published, giving public notice of said election, the time and places thereof, the matters

submitted to the vote of the electors; said notice and order shall be published once a week for at least three weeks prior to such election in a newspaper of general circulation in said county, and if any portion of such proposed district lies within any other county or counties then such order and notice shall be published in a newspaper of general circulation published within each of said counties.

At all elections held under the provisions of this act all persons shall be entitled to vote, who are resident freeholders of agricultural lands within said district, or who are the owners of lands to the extent of forty acres or more within said district and reside within any county into which any part of said district shall extend, and who are qualified electors under the general laws of the state therein and who shall have paid property taxes upon property located within said district during the year preceding any such election. Electors not residing within the district shall be entitled to vote only within the division of such district wherein their lands or a major portion thereof are located; and any person entitled to vote as aforesaid, shall also be eligible to election as a director in and for the division in such district, in which the major portion of his lands are located. The ballots to be used and cast at such election for the formation of such district shall be substantially as follows: "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district; each elector may vote for three directors, one from each division, and shall indicate his vote by placing a marginal cross upon the ballot for or against any question submitted or name voted upon and opposite thereto at any election held under this act.

[Laws 1907, p. 488, § 1; amending Laws 1905, p. 249, § 4.]

3444. Same—Canvass of votes—Proclamation.

SEC. 280. The said board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the votes cast thereat; and if, upon such canvass, it appears that at least a majority of said legal electors in said district have voted "Irrigation District—Yes," the said board shall, by an order entered on their minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices, to be duly elected to such office. Said board shall cause a copy

of such order, including a plat of said district, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the office of the county clerk of each county in which any portion of such lands are situated and no board of county commissioners of any county, including any portion of such district, shall, after the date of organization of such district, allow another district to be formed, including any of the lands of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. For the purpose of the election above provided for, the said board of county commissioners must establish a convenient number of election precincts and polling places in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such districts, and shall also appoint the judges of election for each such precinct, one of whom shall act as clerk of election.

[Laws 1905, p. 249, § 5.]

3445. Officers—Election—Bond.

SEC. 281. The regular election of said district, for the purpose of electing a board of directors shall be held on the first Tuesday after the first Monday in December of each year, at which time one director shall be elected for a term of three years. *Provided*, That at the first election held to choose the first board of directors, after the organization of any district shall have been effected, the person having the highest number of votes shall continue in office for the full term of three years; the next highest two years; and the next highest one year. But if two or more persons have the same number of votes, then their term shall be determined by lot, under the direction of the county judge of the county wherein the organization of said district shall have been effected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their certificates of election herein-after provided for said officers shall take and subscribe the official oath and file the same in the office of the county clerk wherein the organization was effected, and on the first day of January following, shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of three thousand (3,000) dollars which bond shall

be approved by the county judge of the county wherein such organization was effected, and shall be recorded in the office of the county clerk thereof. All official bonds herein provided shall be in form prescribed by law for official bonds for county officials, except that the obligee named in said bonds shall be to the district, and shall be filed with the county clerk at the same time as the filing of the oath herein provided. *Provided, further,* That in all irrigation districts heretofore organized and now exercising the powers granted by law, the term of office of two of the members of their boards of directors is hereby extended for a period of one and two years respectively, and it shall be the duty of said board of directors at their regular meeting held in October, 1907, to determine by lot, under the direction of the county judge of the county wherein such organization was effected, which of said directors shall serve the additional one or two years respectively.

[Laws 1907, p. 489, § 2; amending Laws 1905, p. 250, § 6.]
[See Chapter 99, Official Bonds. See also section 1353.]

3446. Same—Election notice.

SEC. 282. The office of the board of directors shall be located in the county where the organization was affected. Fifteen days before any election held under this act, subsequent to the organization of the district, the secretary who shall be appointed by the board of directors shall cause notice specifying the polling places of each precinct to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. Prior to the time for posting the notices, the board must appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the election must be held.

[Laws 1905, p. 251, § 7.]

3447. Same—Election officers' duties.

SEC. 283. One of the judges shall be chairman of the election board and may: *First*—Administer all oaths required in the

progress of an election. *Second*—Appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock in the morning of election and be kept open until six o'clock p. m. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district.

[Laws 1905, § 8.]

3448. Same—Canvass of votes.

SEC. 284. No lists, tally paper, or certificates returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were open have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for, and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of any question submitted.

[Laws 1905, p. 252, § 9.]

3449. Same—Records—Vacancy and term of office.

SEC. 285. The secretary of the board of directors must, as soon as the result of any election held under the provisions of this act is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show: *First*—A copy of the publication notice of said election. *Second*—The names of the judges of said election. *Third*—The whole number of votes cast in the district and in each precinct of the district. *Fourth*—The names of the persons voted for. *Fifth*—

The office to fill which each person was voted for. *Sixth*—The number of votes given in each precinct for each of such persons. *Seventh*—The number of votes given in the district for each of such persons. *Eighth*—The names of the persons declared elected. *Ninth*—The result declared on any question submitted in accordance with the majority of the votes cast for or against such question. The board of directors must declare elected the person having the highest number of votes given for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the board. In case of a vacancy in the board of directors, by death, removal, or inability from any cause, to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and upon their failure or inability to act within thirty days after such vacancy occurs, then upon petition of five electors of said district the board of county commissioners of the county where the office of said board of directors is situate, shall fill such vacancy or vacancies. Any director appointed as above provided shall hold his office until the next general election of said district, and until his successor is elected and qualified.

[Laws 1905, p. 246, § 10.]

3450. Board of directors—Officers—General duties—Ratio of water distribution.

SEC. 286. The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board shall have power, and it shall be their duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employes as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of water among the owners of said land, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. Said board shall have the power in addition to the means to supply water to said district proposed by the petition submitted for the formation of said district, to construct, acquire, purchase, or condemn any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way, or other property necessary for the use of the district, or to acquire by condemnation, or otherwise, the right to enlarge any ditch, canal or reservoir already constructed or partly constructed. In case of the purchase of any property by

said district, when it shall be proposed by the board of directors to purchase a system of irrigation already constructed or partially constructed, and to enlarge and complete the same adequate to the needs of the district, the board may in such case embody in one contract the matter of the purchase, the enlargement, and the completion of such irrigation system without inviting bids for such construction and completion; and in case of the purchase of such property as aforesaid by said district, the bonds of the district hereinafter provided for may be used at their par value in payment without previous offer of such bonds for sale. But no contract involving a consideration exceeding ten thousand dollars, and not exceeding twenty-five thousand dollars, shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of twenty-five thousand dollars be binding until such contract shall have been authorized and ratified at an election, in manner as is provided for the issue of bonds.

The said rules and regulations shall be printed in convenient form as soon as the same are adopted, for distribution in the district. All waters distributed shall be apportioned to each land owner pro rata to the lands assessed under this act within such district. The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other lands within or without the said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold; *And provided further*, No vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental, *Provided*, That any land owner in said district may with the consent of the board of directors assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other bona fide land owner, to be used in said district for use on his land for said year, provided such owners shall have paid all amounts due on assessments upon all such lands.

The board of directors shall further have power to lease or rent the use of water or to contract for the delivery thereof to settlers upon or occupants of the public domain on the terms hereabove provided; *Provided*, That in such case the board of directors shall have the further power to make a contract on behalf of the district with such settler or occupant to the effect that such settler or occupant shall, upon receiving full title to his lands and upon

the payment of his proportionate share of the bond assessments as provided in section 35, include his lands within said district, and shall upon such inclusion be entitled to all the rights and privileges of a member of said district. Before the execution of such contract the board of directors shall cause notice of such contract to be given substantially as provided in section 33 of this act, with such changes in the form of the notice as may be necessary, and a hearing upon said contract and all objections thereto shall be had as provided in section 34 of this act. If upon said hearing the board of directors deem it not for the best interests of the district to execute said contract, they shall by order refuse to execute said contract; but if they deem it for the best interests of the district that said contract be executed, the board may execute said contract, and in such case said contract shall be valid and binding upon all parties thereto, and when the said settler or occupant shall have complied with said contract and obtained title to his lands, the board shall, upon proof of such compliance and obtaining of title, and without any further notice or hearing upon the matter, enter an order of inclusion of said lands as provided in section 36 of this act; *Provided*, If within thirty days from the execution of said contract, a majority of the qualified electors of the district protest in writing to said board against the execution of said contract, said contract shall be held for naught, and shall not be binding upon any party thereto.

[Laws 1909, p. 422, § 1.]

3451. Directors—Meetings—Duties—Domain—Public use.

SEC. 287. The board of directors shall hold a regular quarterly meeting in their office on the first Tuesday in January, April, July and October, and such special meetings as may be required for the proper transaction of business. All special meetings shall be called by the president of the board, or any two directors. All meetings of the board must be public, and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote there shall be a concurrence of at least two members of said board. All records of the board must be open to the inspection of any elector during business hours. The board, its agents, and employes, shall have the right to enter upon any land in the district, to make surveys and to locate and construct any canal or canals, and the necessary laterals. Said board shall also have the right to acquire all lands, water rights, franchises and other property necessary for the construction, use, maintenance, repair, and improvement of its canals, ditches, reservoirs and water works; and shall also have the right

by purchase or condemnation to acquire rights of way for the construction or enlargement of any of its ditches, canals or reservoirs, also lands for reservoir sites.

[Laws 1905, p. 254, § 12.]

3452. Property—Title.

SEC. 288. The title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act, and shall be exempt from all taxation, and said board is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided; *Provided*, That when any district contemplated in this act shall find it necessary to procure and acquire a supply of water from outside the boundaries of this state, then and in such event it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for.

[Laws 1905, p. 255, § 13.]

3453. Conveyances—Suits.

SEC. 289. The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this act in the name of such irrigation district to and for the purposes herein expressed and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act or to enforce, maintain, protect, or preserve any or all rights, privileges and immunities created by this act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state, now or hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in section 3 of this act; and a certified copy of said order shall be prima facie evidence in all actions, suits and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters and proceedings therein recited and set forth; and any such irrigation

district, in regard to which any such order has been heretofore or may hereafter be entered, and such certified copy thereof, so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office and the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing irrigation district within the meaning of this act; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this act or otherwise.

[Laws 1905, § 14.]

[Section 3 above referred to is section 3442.]

3454. Bond—Elections.

SEC. 290. For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches and works, and acquiring the necessary property and rights therefor, for the purpose of paying the first year's interest upon the bonds herein authorized, and otherwise carrying out the provisions of this act, the board of directors of any such district shall, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised for such purposes, and shall forthwith call a special election, at which election shall be submitted to the electors of such district possessing the qualifications prescribed by this act the question of whether or not the bonds of said district shall be issued in the amount so determined. A notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this act governing the election of officers; *Provided*, That no informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted. At

such election the ballots shall contain the words "Bonds—Yes" or "Bonds—No" or words equivalent thereto. If a majority of the legal electors who are freeholders and taxpayers within said district have voted "Bonds—Yes" the board of directors shall immediately cause bonds in such amount to be issued and payable in series as follows, to-wit:

At the expiration of eleven years, not less than five per cent. of the whole amount and number of said bonds; at the expiration of twelve years, not less than six per cent. of the whole amount and number of said bonds; at the expiration of thirteen years, not less than seven per cent. of the whole amount and number of said bonds; at the expiration of fourteen years, not less than eight per cent. of the whole amount and number of said bonds; at the expiration of fifteen years not less than nine per cent. of the whole number of said bonds; at the expiration of sixteen years, not less than ten per cent. of the whole amount and number of said bonds; at the expiration of seventeen years, not less than eleven per cent. of the whole amount and number of said bonds; at the expiration of eighteen years, not less than thirteen per cent. of the whole amount and number of said bonds; at the expiration of nineteen years, not less than fifteen per cent. of the whole amount and number of said bonds; at the expiration of twenty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage; that said bonds shall bear interest at the rate of not to exceed six per cent. per annum payable semi-annually on the first day of June and December of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected as aforesaid, and at such other place as the board of directors may designate in such bond. Said bonds shall be each of the denomination of one hundred dollars, nor more than five hundred dollars, shall be negotiable in form, executed in the name of the district and signed by the president and secretary, and the seal of the district shall be affixed thereto. Said bonds shall be numbered consecutively as issued, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their face that they are issued by the authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser. *Pro-*

vided, Any such district may, by a majority vote of the legal electors of said district, provide for the issuance of bonds that will mature in any number of years less than twenty, and arrange for the payment thereof, in series as above provided; *Provided, further*, That when the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued submitting the question at special election to the qualified voters of said district, otherwise complying with the provisions of this section in respect to an original issue of such bonds; *Provided, also*, The lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue.

[Laws 1905, p. 256, § 15.]

3455. Bonds—Sale—Proceeds.

SEC. 291. The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or purchase of canals, reservoir sites, reservoirs, water rights and works, and otherwise to fully carry out the object and purposes of this act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Denver, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five per cent. of the face value thereof. In case no bid is made and accepted as above provided the board of directors is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, water rights and works, or for the construction of any canal, reservoir and works; *Provided*, Such bonds shall not be so disposed of at less than ninety-five per cent. of the face value thereof.

[Laws 1905, p. 258, § 16.]

[State may purchase ten per cent. of the bond issue. Section 5198.]

3456. Bonds—Payment—Lien.

SEC. 292. Said bonds, and the interest thereon, shall be

paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided.

[Laws 1905, p. 259, § 17.]

3457. Board of directors—Levy.

SEC. 293. It shall be the duty of the board of directors, on or before September first of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred.

[Laws 1905, p. 259, § 18.]

3458. Assessor—Assessment.

SEC. 294. It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre; *Provided*, That in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation.

[Laws 1905, p. 259, § 19.]

3459. County commissioners.

SEC. 295. It shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, and to fix the rate necessary to provide the amount of money required to pay the

interest and principal of the bonds of said district as the same shall become due; also, to fix the rate necessary to provide the amount of money required for any other purposes as in this act provided, and which are to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the assessed valuation of the property of said district shall be increased fifteen per cent. to cover delinquencies. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all real estate in said district within their respective counties. All taxes levied under this act are special taxes.

[Laws 1905, p. 246, § 20.]

3480. District treasurer.

SEC. 296. The county treasurer of the county in which is located the office of any irrigation district, shall be and is hereby constituted ex-officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. Said treasurer shall collect, receive and receipt for all moneys belonging to said district. It shall be the duty of the county treasurer of each county in which any irrigation district is located in whole or in part, to collect and receipt for all taxes levied as herein provided in the same manner and at the same time, and on the same receipt as is required in the collection of taxes upon real estate for county purposes; *Provided, however*, That such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said taxes were levied, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owns; *Provided, further*, That such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds of said irrigation district maturing within the year the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount

of district bonds funds tax which the person tendering the same owns. The county treasurer of each county comprising a portion only of the irrigation district, excepting the county treasurer of the county in which the office of said district is located, shall on the first Mondays of every month remit to the district treasurer aforesaid all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district. Every county treasurer shall keep a bond fund account and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district, said accounts for interest and principal shall be kept separate. The general fund shall consist of all other moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer aforesaid shall pay out of said bond fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, and shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district as herein provided. The district treasurer, on the fifteenth day of each month, shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds above provided; the amount of warrants paid during the previous month, and the amount of registered warrants if there be any. All such district taxes collected and paid to the county treasurers as aforesaid shall be received by said treasurers in their official capacity, and they shall be responsible for the safe-keeping, disbursement and payment thereof the same as for other moneys collected by them as such treasurers; *Provided*, Said county treasurer shall receive as his sole compensation for the collection of such taxes, such amount as the board of directors may allow, to be not less than twenty-five (25) dollars, nor more than one hundred (100) dollars, which compensation shall be considered as a part of the regular salary of such county treasurer as provided by law.

[Laws 1907, p. 490, § 3.]

[For treasurer using public money or dealing in warrants see sections 1820-1826.]

3461. Assessment—Collection.

SEC. 297. The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes.

[Laws 1905, p. 262, § 22.]

3462. Construction—Contracts.

SEC. 298. After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice, by publication thereof, not less than twenty days in a newspaper published in each of the counties into which any such irrigation extends, provided a newspaper is published therein, and in such other newspapers as they may deem advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice; said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and the place for opening the proposals, which at said time and place shall be opened in public, and as soon as convenient thereafter the board shall let said work, either in portions, or as a whole, to the lowest responsible bidder, or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten per cent. of the amount of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board.

[Laws 1905, p. 246, § 23.]

3463. Claim—Audit—Payment—Financial report.

SEC. 299. No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes; and if the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "Not paid for want of funds, this warrant draws interest from date at six per cent. per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of six per cent. per annum; *Provided*, When there is more than the sum of one hun-

dred dollars or more in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants.

[Laws 1905, p. 246, § 24.]

3464. Expenses of organization, how defrayed.

Sec. 300. For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair and improvement of all canals, ditches, reservoirs and works, including salaries of officers and employes, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation, or other purposes, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessment; *Provided*, That in case the money raised by the sale of bonds issued be insufficient, and in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in this act.

[Laws 1905, p. 264, § 25.]

3465. Crossing streams, highways, railroads, state lands, etc.

Sec. 301. The board of directors shall have the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, can not agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined

in all respects as is provided in respect to the taking of land for public uses. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works or reservoirs, over, through, or upon any of the lands which are now, or may be the property of the state.

[Laws 1905, p. 264, § 26.]

3466. Officers' salaries—Not interested in contracts.

SEC. 302. The board of directors shall each receive at the rate of two and one-half dollars per day while attending meetings, and their actual and necessary expenses while engaged in official business. The salary of the secretary shall not exceed eight hundred dollars per annum. No director or any officer named in this act shall, in any manner, be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall receive any bonds, gratuity, or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding five years nor less than one year.

[Laws 1905, p. 264, § 27.]

3467. Limit of indebtedness.

SEC. 303. The board of directors, or other officers of the district, shall have no power to incur any debt or liability, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.

[Laws 1905, p. 264, § 28.]

3468. Insufficient supply—Distribution.

SEC. 304. In case the volume of water in any canal, reservoir or other works in any district shall not be sufficient to supply the continual wants of the entire district and susceptible of irrigation therefrom, then it shall be the duty of the board of directors to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned.

[Laws 1905, p. 264, § 29.]

3469. Compensation for property taken.

SEC. 305. Nothing herein contained shall be deemed to authorize any person or persons, to divert the waters of any river, creek, stream, canal, or reservoir to the detriment of any person or persons having a prior right to the waters of such river, creek, stream, canal, or reservoirs, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use.

[Laws 1905, p. 265, § 30.]

3470. Boundaries—Change of—Effect.

SEC. 306. The boundaries of any irrigation district now or hereafter organized under the provisions of this act, may be changed in the manner herein prescribed; but such change of the boundaries of the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for, or upon which it was or might become liable or chargeable had such change of its boundaries not been made.

[Laws 1905, § 31.]

3471. Contiguous territory—Annexation—Petition.

SEC. 307. The holder or holders of title, or evidence of title, of any land adjacent to or situated within the boundaries of any irrigation district or irrigable from the ditches, canals and irrigation works of the district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts, or body of land owned by the petitioners, but such description need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged.

[Laws 1911, S. B. No 281, § 1.]

3472. Contiguous territory—Notice.

SEC. 308. The secretary of the board of directors shall cause notice of the filing of such petition to be given and published once each week for three successive weeks, in a newspaper published in the county where the office of said board is situate, which

notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners; giving notice to all persons interested, to appear at the office of said board at a time named in said notice, and show cause, in writing, if any they have, why the petition should not be granted. The time specified in the notice at which it shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner, or petitioners, shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice.

[Laws 1905, p. 266, § 33.]

3473. Contiguous territory—Hearing.

SEC. 309. The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of said petition may adjourn, shall proceed to hear the petition, and all objections thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition.

[Laws 1905, p. 266, § 34.]

3474. Payment.

SEC. 310. The board of directors, to whom such petition is presented, may require as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of its pro rata share of all bonds and the interest thereon, which may have previously thereto been issued by said district had such lands been included in such district at the time the same was originally formed or when said bonds were so issued.

[Laws 1905, p. 266, § 35.]

3475. Boundaries—Orders.

SEC. 311. The board of directors if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition, but if they

deem it for the best interests of the district that said lands be included, the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall describe the entire boundaries of the district with the lands so included, if the district boundaries be changed thereby, and for that purpose the board may cause a survey to be made of such portion of such boundaries as may be deemed necessary, *Provided*, If within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. *Provided*, That in the case of inclusion of government land according to the provisions of section 11, said protest must be made within thirty days of the date of the execution of the contract therein provided for.

[Laws 1909, p. 422, § 2.]

3476. Order—Record—Effect.

SEC. 312. Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change, and a plat of such district, showing such change, if any, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change of the boundaries as aforesaid, had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable for all existing obligations and indebtedness of the organized district.

[Laws 1905, p. 267, § 37.]

3477. Records—Evidence.

SEC. 313. Upon the filing of the copies of the order and the plat, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the said minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the petition.

[Laws 1905, p. 267, § 38.]

3478. Legal representatives petitioners.

SEC. 314. A guardian, executor or an administrator of an estate, who is appointed as such under the laws of this state, and

who, as such guardian, executor or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may on behalf of his ward or the estate which he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition in this act mentioned, and may show cause, as in this act mentioned, why the boundaries of the district should not be changed.

[Laws 1905, p. 267, § 39.]

3479. Redivision of district—Election of officers.

SEC. 315. In case of the inclusion of any land within any district by proceedings under this act the board of directors shall, at least thirty days prior to the next succeeding general election, make an order redividing such district into three divisions, as nearly equal in size as may be practicable, which shall be numbered first, second and third, and one director shall thereafter be elected by each division. For the purposes of election the board of directors shall establish a convenient number of election precincts in said districts, and define the boundaries thereof, which said precincts may be changed from time to time as the board may deem necessary.

[Laws 1905, p. 267, § 40.]

3480. Exclusion of lands.

SEC. 316. Any tract of land included within the boundaries of any such district, at or after its organization, under the provisions of this act, may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair or discharge any contract, obligation, lien or charge for or upon which it would or might become liable or chargeable, had such land not been excluded from the district.

[Laws 1905, p. 267, § 41.]

3481. Petition for exclusion.

SEC. 317. The owner or owners in fee of any lands constituting a portion of any irrigation district may file with the board of directors of the district, a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the petitioners desire to have excluded, but the description of such lands need not be more par-

ticular than required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land.

[Laws 1905, p. 267, § 42.]

[For form of acknowledgment see section 691.]

3482. Same—Notice.

Sec. 318. The secretary of the board of directors shall cause a notice of the filing of such petition to be published for at least three weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of said district lie within another county or counties, then said notice shall be so published in a newspaper published within each of said counties; or if no newspapers be published therein, then by posting such notice for the same time in at least three public places in said district, and in case of the posting of said notices, one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, description of the lands mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause in writing, if any they have, why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice.

[Laws 1905, p. 269, § 43.]

3483. Same—Hearing.

Sec. 319. The board of directors at the same time and place mentioned in the notice, or at the time or times to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any persons, showing cause as aforesaid why the prayer of said petitioner should not be granted. The filing of such petition with such board as aforesaid, shall be deemed and taken as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof.

[Laws 1905, p. 269, § 44.]

3484. Same—Orders.

SEC. 320. The board of directors, if they deem it not for the best interest of the district that the lands mentioned, in the petition or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned, in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district. *Provided*, If within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught and such lands shall not be excluded therefrom.

[Laws 1905, § 45.]

3485. Order—Record—Effect.

SEC. 321. Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change of the boundaries as aforesaid, had not been excluded therefrom.

[Laws 1905, p. 270, § 46.]

3486. Division of districts.

SEC. 322. At least thirty days before the next general election of such district the board of directors thereof may make an order dividing said district into three divisions, as nearly equal in size as practicable, which shall be numbered first, second and third, and one director shall be elected for each division by the qualified electors of the whole district. For the purpose of election in such district the said board of directors must establish a convenient number of election precincts, and define the boundaries thereof, which said precincts may be changed from time to time, as the board of directors may deem necessary.

[Laws 1905, p. 267, § 47.]

3487. Dissolution of district—Election.

SEC. 323. Whenever a majority of the resident freeholders, representing a majority of the number of acres of the irrigable land, in any irrigation district organized, or hereafter to be organized, under this act, shall petition the board of directors to call a special election, for the purpose of submitting to the qualified electors of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition, that all bills and claims of every nature whatsoever have been fully satisfied and paid, it shall be the duty of said directors, if they shall be satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of the said election, and to cause notice of said election to be published in some newspaper in each of the counties or county in which said district is located, for a period of thirty (30) days prior to said election, setting forth the time and place for holding said election in each of the three voting precincts in said district. It shall also be the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For dissolution—Yes" and "For dissolution—No."

[Laws 1905, p. 267, § 48.]

3488. Same—Canvass—Record.

SEC. 324. The board of directors shall name a day for canvassing the vote, and if it shall appear that a majority of said ballots contain the words, "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized, and shall certify to the county clerk of the respective counties, in which the district is situated, stating the number of signers to said petition. The said election was called and set for the day of....., month of year. That said election was held and that so many votes (stating the number) had been cast for, and that so many votes (stating the number) had been cast against said proposition, said certificate to bear the seal of the district, and the signatures of the president and secretary of said board of directors. And it shall be the duty of the said respective clerks to record all such certificates in the records of the respective counties. Should it appear that a majority of the votes cast at said election were "For Dissolution—No," then the board of directors shall declare the proposition lost and shall cause the result and the vote to be made a part of the records of said irrigation district.

[Laws 1905, p. 267, § 49.]

3489. Judicial examination and confirmation.

SEC. 325. The board of directors of an irrigation district organized under the provisions of this act may commence special proceedings, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, or disposed of may be judicially examined, approved and confirmed.

[Laws 1905, p. 271, § 50.]

3490. Same—Petition.

SEC. 326. The board of directors of the irrigation district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situated, a petition, praying, in effect, that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of said first board of directors.

[Laws 1905, p. 272, § 51.]

3491. Same—Notice of hearing.

SEC. 327. The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of..... irrigation district, (giving its name) praying that the proceedings for the issue and sale of said bonds of said district may be examined, approved and confirmed by the court.

[Laws 1905, p. 267, § 52.]

3492. Same—Answer—Pleading.

Sec. 328. Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition. The provisions of the code of civil procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring and answering said petition shall be the defendant to the special proceeding, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer shall, for the purpose of said special proceeding, be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statement of the petition. The rules of pleading and practice relating to appeals and writs of error provided by the code of civil procedure which are not inconsistent with the provisions of this act are applicable to the special proceedings herein provided for.

[Laws 1905, p. 273, § 53.]

3493. Same—Determination—Costs.

Sec. 329. Upon the hearing of such special proceeding the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner in this act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof. The court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said special proceedings; and the court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court.

[Laws 1905, p. 273, § 54.]

3494. Repeal—Saving clause.

Sec. 330. That an act entitled an act to provide for the organization and government of irrigation districts, etc., approved

April 12th, 1901, and all acts and parts of acts amendatory thereof, be and the same are hereby repealed. *Provided*, Nothing herein contained shall invalidate or affect any act or proceeding done or pending thereunder; but all such pending proceedings may be continued and concluded under such repealed provisions, the same as if this statute had not been adopted, or may be continued or concluded under the provisions of this act; *And, provided, further*, That nothing herein contained shall impair the organization, rights, powers and privileges of any irrigation district organized under any act or provision so repealed.

[Laws 1905, p. 273, § 55.]

3494-A. Agricultural college and school lands.

SEC. 330a. For the purpose of furnishing water and securing water rights for agricultural college and public school lands, lying within or adjacent to the boundaries of any irrigation district now organized, or which may hereafter be organized, the state board of land commissioners is hereby authorized to petition all such lands into such irrigation districts.

[Laws 1909, p. 429, § 1.]

3494-B. Form and requirements of petition.

SEC. 330b. All such petitions shall be in the form now provided by law for the petition of other lands into such irrigation districts, and shall be signed, sealed and acknowledged by the register of the state board of land commissioners, on behalf of said board, and shall in addition be countersigned by the governor of the state, on behalf of the state, and when so signed, sealed, acknowledged and filed with the board of directors of any irrigation district, shall be deemed to give the assent of said state board of land commissioners and the state of Colorado to the inclusion of all lands therein described in said irrigation district.

[Laws 1909, p. 429, § 2.]

3494-C. Assessments.

SEC. 330c. All such lands so included in any irrigation district in this state, shall be assessed for irrigation district purposes in the same manner and at the same rate as other lands in such irrigation districts.

[Laws 1909, p. 429, § 3.]

3494-D. Duties of county treasurer and register of land board.

SEC. 330d. It shall be the duty of the county treasurer of each and every county in this state wherein any irrigation district

is located, and in which such lands have been so included, to notify the register of the state board of land commissioners, on or before the first day of February of each and every year of the amount of district assessments due on such lands, giving therein the exact description of each tract of land so assessed and the amount of assessments due thereon. Immediately upon receiving such notice it shall be the duty of the register of said state board of land commissioners to place the same before said board at their next regular meeting, who shall examine said notice of assessments due, and if the same be found correct, they shall certify the same to the state treasurer who shall pay the same out of any of the moneys in his hands belonging to said respective land funds howsoever derived, and charge the same to said respective funds. Such payment shall be by warrant from the state treasurer to the proper county treasurer, and when so received by him, he shall issue his receipts therefor in the name of the state board of land commissioners, and shall in addition issue a duplicate receipt to said state treasurer.

[Laws 1909, p. 429, § 4.]

3494-E. Assessments—Accrued assessments.

SEC. 330c. Upon the receipt of such receipts from said county treasurers, it shall be the duty of the register of the state board of land commissioners to enter and charge the same against each tract of land so paid on, in a book to be kept by him for that purpose, showing the amount paid, date of payment and to whom paid, and whenever any of said tracts of land shall be sold, the purchaser thereof, in addition to the purchase price therefor, shall pay all of such accrued assessments so paid as aforesaid, together with interest thereon, from the date of payment at the rate of 6 per centum per annum, such accrued assessments and interest thereon to be included in the total purchase price to be paid by said purchaser, *Provided*, That this section shall not apply to such assessments as shall have been paid by the lessees of any such tracts of land, theretofore leased from the state as hereinafter provided.

[Laws 1909, p. 429, § 5.]

3494-F. Rent.

SEC. 330f. In the event that any such tracts of land so included within any irrigation district, shall be leased from the state board of land commissioners, then and in that case all such lessees shall in addition to the rental paid to said state board of land

commissioners, pay such an additional amount to said board as will equal the district assessments levied upon such lands for the year in which such rental shall be paid; and such moneys when so received by the register of the state board of land commissioners, shall be turned into the state treasurer and be by him kept in a separate fund for the payment of such assessments aforesaid.

[Laws 1909, p. 429, § 6.]

3494-G. Requirements of contracts of sale.

SEC. 330g. All contracts for the sale of any such lands included within any irrigation district shall, in addition to the purchase price to be paid, provide that such purchaser shall on or before the first day of March in each and every year, until he shall have secured a patent for such lands, pay unto the register of the state board of land commissioners such an amount as will equal the district assessments so levied upon such lands for the year in which such payment is to be made, and such moneys when so received by said register, shall be turned into the state treasurer and be by him kept in a separate fund for the payment of such assessments aforesaid.

[Laws 1909, p. 429, § 7.]

VIII-A. DRAINAGE DISTRICTS.

Section.

- 3494-H. Petition for organization.
- 3494-J. By whom signed—Committee.
- 3494-K. Bond.
- 3494-L. Advance of costs.
- 3494-M. Expenses by whom paid.
- 3494-N. Publication of petition.
- 3494-O. Hearing on the petition.
- 3494-P. Change of boundaries.
- 3494-Q. Order granting prayer.
- 3494-R. County commissioners when to act as district directors.
- 3494-S. Election notice.
- 3494-T. Three directors—Division of district.
- 3494-U. Polling places.
- 3494-V. Judges of election.
- 3494-W. Publication of notice.
- 3494-X. Qualified voters.
- 3494-Y. Canvass of vote.
- 3494-Z. File plat with clerk.
- 3494-A1. Organization when complete.
- 3494-B1. Action affecting organization.
- 3494-C1. President and secretary—Seal.
- 3494-D1. Powers of board.
- 3494-E1. Surveys—Contracts.
- 3494-F1. Quarterly meetings.
- 3494-G1. Meetings public—Quorum—Record.
- 3494-H1. Right of entry.
- 3494-J1. Title vests in district—Tax exemption.
- 3494-K1. Corporate powers.
- 3494-L1. Per diem expenses—Salary.
- 3494-M1. Annual election of directors.
- 3494-N1. Oath of office.
- 3494-O1. Bond of directors.
- 3494-P1. Office.
- 3494-Q1. Notice of election.
- 3494-R1. Judges of election.
- 3494-S1. Idem.
- 3494-T1. Election oaths.
- 3494-U1. Polls open and close.
- 3494-V1. Count of ballots.
- 3494-W1. Canvass of returns.
- 3494-X1. Tie vote.
- 3494-Y1. Announcement of result of election.
- 3494-Z1. Certificate of election.
- 3494-A2. Vacancies how filled.
- 3494-B2. Treasurer of district.
- 3494-C2. Duties of treasurer.
- 3494-D2. Monthly remittances—Warrants.
- 3494-E2. Warrants to be signed and sealed.
- 3494-F2. Interest after presentation.
- 3494-G2. Verification of claims—Register.
- 3494-H2. Registry—Vouchers.

- 3494-J2. Report of treasurer.
 - 3494-K2. Annual estimate.
 - 3494-L2. Assessments for interest.
 - 3494-M2. Assessment book—Annual audit.
 - 3494-N2. Returns to assessor.
 - 3494-O2. Assessment book to district treasurer.
 - 3494-P2. Reference to revenue law.
 - 3494-Q2. Advertisement for bids.
 - 3494-R2. Contractors to give bond.
 - 3494-S2. Special election on bond issue.
 - 3494-T2. Election notice.
 - 3494-U2. Bonds payable in series—Interest.
 - 3494-V2. Details as to bonds and coupons.
 - 3494-W2. Bonds under 20 years.
 - 3494-X2. Additional issue of bonds—Lien.
 - 3494-Y2. Sale of bonds.
 - 3494-Z2. Sealed proposal for bonds.
 - 3494-A3. Annual assessment to pay bonds.
 - 3494-B3. Right of way.
 - 3494-C3. Right of way over state land.
 - 3494-D3. Directors not to be interested in contracts.
 - 3494-E3. Property in certain water.
 - 3494-F3. Vacancies.
 - 3494-G3. Judicial notice.
 - 3494-H3. Annexation of new acreage.
 - 3494-J3. Judicial proceedings same as in case of irrigation districts.
 - 3494-K3. Voluntary contract for drainage district.
 - 3494-L3. Approval of voluntary district by county commissioners.
 - 3494-M3. Petition to dissolve.
 - 3494-N3. Order of dissolution.
 - 3494-O3. Repeal with saving clause.
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3494-H. Petition for organization.

SEC. 330h. It is hereby declared by this general assembly that the reclamation by drainage of lands not at present cultivable or useful or fully so will be conducive to the public health, convenience, utility or welfare, and the owners of agricultural lands susceptible of drainage by the same general system of works may propose the organization of a drainage district, by presenting to the board of county commissioners of the county where the larger portion of said lands lie, a petition giving the name of the proposed district, and praying that the board of county commissioners cause the question of the organization of said district to be submitted to a vote of the owners of the lands lying within the boundaries thereof, or that a drainage system may be established, without election, as provided in section 10 of this act.

[Laws 1911, S. B. No. 76, § 1.]

3494-J. By whom signed—Committee.

SEC. 330j. Said petition shall be signed by a majority of the owners of said lands whether residents or non-residents of said county, as well as by the owners in the aggregate of a majority of the total number of acres of land sought to be included in said district; and shall contain a general description of the boundaries of said proposed district and a statement that the lands within said proposed district are not at present cultivable or useful or fully so, and they can be made more productive or useful by drainage, and shall be accompanied by a map, drawn to a scale of two inches to the mile, and a statement showing generally the drainage ditch, works or system, by which it is proposed to drain said lands, and giving the names of the owner or owners of each tract of land, appearing of record, through which said drainage works are proposed to be constructed, and which will be drained thereby. The petitioners shall select and name in said petition a committee of three or more of said petitioners, to present such petition to the board of county commissioners and to give notice thereof as provided in section 6 of this act.

[Laws 1911, S. B. No. 70, § 2.]

3494-K. Bond.

SEC. 330k. Said petition shall be accompanied by a good and sufficient bond with sureties to be approved by the said board of county commissioners, in a penal sum double the amount of the probable cost of organizing said district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected.

[Laws 1911, S. B. No. 70, § 2.]

3494-L. Advance of costs.

SEC. 330l. In lieu of a bond the board of county commissioners may in its discretion require the petitioners to pay in advance to the county treasurer from time to time such sum or sums of money as in the opinion of the board of county commissioners, will be required for the costs and expenses of organizing said district.

[Laws 1911, S. B. No. 70, § 4.]

3494-M. Expenses by whom paid.

SEC. 330m. In case the district shall be organized, the expenses incurred by the county shall be paid to the county by said district, and all advances made by the petitioners to the county

shall be refunded by the county to the petitioners, who shall have advanced the same.

[Laws 1911, S. B. No. 70, § 5.]

3494-N. Publication of petition.

SEC. 330n. Prior to the presentation of said petition to the board of county commissioners, said petition shall be published in some newspaper of general circulation, printed and published in the county where said petition will be presented, for at least two weeks, together with a notice signed by the committee selected by the petitioners and named in said petition, giving the time and place of the presentation of the same to the board of county commissioners.

[Laws 1911, S. B. No. 70, § 6.]

3494-O. Hearing on the petition.

SEC. 330o. At the time and place designated in said notice, if it shall appear that the notice of the presentation of said petition has been given as required by law and that said petition has been signed by the number of petitioners required by this act, the board of county commissioners shall hear said petition, and applications for the exclusion of lands from said district and applications for the inclusion of lands therein, and may adjourn such hearing from time to time not exceeding four weeks in all.

[Laws 1911, S. B. No. 70, § 7.]

3494-P. Change of boundaries.

SEC. 330p. The board of county commissioners of said county may make such changes in the boundaries of said proposed district as may be necessary by including therein upon the application of the owner or owners thereof other lands susceptible of drainage by the proposed system, or which will be benefited by said system of drainage, and by excluding therefrom lands mentioned in said petition which in the opinion of said board of county commissioners will not be susceptible of drainage thereby or will not be benefited by said system of drainage, but said board of county commissioners shall not exclude from said district any lands described in said petition which, in the opinion of the board, are susceptible of drainage by said system or will be benefited thereby.

[Laws 1911, S. B. No. 70, § 8.]

3494-Q. Order granting prayer.

SEC. 330q. When the boundaries of any proposed drainage district shall have been determined as aforesaid, the board of

county commissioners shall make an order allowing the prayer of said petition, defining and establishing the boundaries and designating the name of the proposed district.

[Laws 1911, S. B. No. 70, § 9.]

3494-R. County commissioners when to act as district directors.

SEC. 330r. When the prayer of said petition is that a drainage system may be established without holding an election and it appears that a large portion of the land which will be benefited by the proposed drainage system, is unoccupied land or so many of the owners of land to be benefited thereby are not residents upon the land, that an election would be impracticable or would entail an undue expense, the board of county commissioners of said county is hereby authorized at any regular or special session, to cause a system of drainage to be constructed, and to exercise all the powers and authority, in this act conferred upon boards of directors of drainage districts, and shall continue to exercise said powers and authority and perform the duties of boards of directors, until a petition shall be presented signed by the owners of the larger portion of said lands, or their duly authorized agents, praying that an election may be called to elect directors for said district, when the board of county commissioners shall call an election for that purpose and as soon as the result of said election is determined the board of county commissioners shall cease to have or exercise the duties of directors of a drainage district.

[Laws 1911, S. B. No. 70, § 10.]

3494-S. Election notice.

SEC. 330s. When the petition prays that an election shall be held, the board of county commissioners shall order an election to be held within the proposed drainage district for the purpose of determining whether or not said district shall be organized and shall cause to be published a notice of said election which shall contain:

The name of the proposed district;

The boundaries thereof;

The polling place or polling places;

The names of the judges of election;

The names of three or more persons eligible for directors of said district;

The date of said election;

Said notice shall require the electors to cast ballots which shall contain the words:

"Drainage District—Yes;" or

"Drainage District—No."

Said notice shall be signed by the chairman of the board of county commissioners and attested by the county clerk under the seal of the county.

[Laws 1911, S. B. No. 70, § 11.]

3494-T. Three directors—Division of district.

SEC. 330t. There shall be elected three directors who shall be owners of land within said district; but the board of county commissioners may divide, and if requested in said petition shall divide said district into three divisions, as nearly equal as conveniently may be, which shall be numbered 1, 2 and 3, respectively, and in that event, the voters of each division shall elect one director, who shall be the owner of land within said division, and the three thus elected shall be the directors of said district.

[Laws 1911, p. 315, § 12.]

3494-U. Polling places.

SEC. 330u. The board of county commissioners shall designate a polling place within said district and, if necessary, shall establish a convenient number of election precincts within said district, define the boundaries thereof, and designate the polling place in each precinct.

[Laws 1911, S. B. No. 70, § 13.]

3494-V. Judges of election.

SEC. 330v. The board of county commissioners shall appoint for each precinct from the qualified electors who shall be owners of lands therein three judges of election who shall exercise the powers and duties usually performed by judges of election in this state.

[Laws 1911, S. B. No. 70, § 14.]

3494-W. Publication of notice.

SEC. 330w. Said notice shall be published for at least two weeks preceding said election in a newspaper of general circulation, printed and published, within said county; and a like notice shall be published in a like newspaper in each county, within which any portion of said district may lie.

[Laws 1911, S. B. No. 70, § 15.]

3494-X. Qualified voters.

SEC. 330x. Every owner of land within said district, who is a citizen of the United States, or has declared his intention to become a citizen of the United States, and is a resident of the state of Colorado, shall be entitled to vote at such election in the precinct where he resides, or if a non-resident of the precinct, then in the precinct within which the greater portion of his land lies.

[Laws 1911, S. B. No. 70, § 16.]

3494-Y. Canvass of vote.

SEC. 330y. The board of county commissioners shall meet on the second Monday following said election and proceed to canvass the votes cast thereat; and, if it shall appear that a majority of the votes cast are, "Drainage District—Yes," the board of county commissioners shall make an order declaring that said drainage district is fully organized under the name theretofore designated and that the persons who receive the highest number of votes respectively, are duly elected directors of said district.

[Laws 1911, S. B. No. 70, § 17.]

3494-Z. File plat with clerk.

SEC. 330z. The board of county commissioners shall cause a certified copy of said order, together with a copy of the plat of said district to be filed with the county clerk of each county in which any portion of said district lies, and thereafter no land within said district shall be included within the boundaries of any other drainage district, without the consent of the owner of the land sought to be embraced within such other district.

[Laws 1911, S. B. No. 70, § 18.]

3494-A1. Organization when complete.

SEC. 330a1. From and after the date of such filing the organization of said district shall be complete, and the officers thereof shall forthwith enter upon the duties of their respective offices, upon qualifying according to law, and shall hold their respective offices until their successors are elected and qualified.

[Laws 1911, S. B. No. 70, § 19.]

3494-B1. Action affecting organization.

SEC. 330b1. No action shall be brought or maintained or defense made, affecting the validity of the organization of said

district, unless the same shall have commenced or made within one year after the entry of said order.

[Laws 1911, p. 315, § 20.]

3494-C1. President and secretary—Seal.

SEC. 330c1. The board of directors shall elect a president from the members of the board and shall appoint a secretary, and adopt a drainage district seal.

[Laws 1911, S. B. No. 70, § 21.]

3494-D1. Powers of board.

SEC. 330d1. The board of directors shall have the care and management of the affairs and business of the drainage district; and shall fix the compensation of all employees.

[Laws 1911, S. B. No. 70, § 22.]

3494-E1. Surveys—Contracts.

SEC. 330e1. The board of directors may cause surveys to be made for ditches and drainage works and rights of way for said district; and to cause ditches, drainage works, rights of way, and other property, necessary for said district, to be laid out, constructed, purchased and acquired, by condemnation or otherwise, but the board of directors shall have no power to make any contract or authorize any expenditure involving more than \$5,000 unless such contract or expenditures shall be authorized, approved and ratified in writing, by owners of land in said drainage district equal in number to a majority of votes cast at the last district election; and no contract or expenditure involving more than \$10,000 shall be made or be binding unless the question of making said contract or expenditure shall have been submitted and said expenditure authorized at an election in said district.

[Laws 1911, S. B. No. 70, § 23.]

3494-F1. Quarterly meetings.

SEC. 330f1. The board of directors shall hold a regular meeting in the office of the drainage district on the first Tuesday in January, April, July and October, and such special meetings as may be required for the proper transaction of business. Special meetings shall be called by the president of the board, or any director.

[Laws 1911, S. B. No. 70, § 24.]

3494-G1. Meetings public—Quorum—Record.

SEC. 330g1. Meetings of the board of directors shall be pub-

lic, and two directors shall constitute a quorum for the transaction of business; on all questions requiring a vote there shall be a concurrence of at least two directors. The record of the board shall be open to the inspection of the public during business hours.

[Laws 1911, p. 315, § 25.]

3494-H1. Right of entry.

SEC. 330h1. The directors, agents and employees of the drainage district shall have the right to enter upon any land in the district to make surveys and to locate drainage ditches and laterals.

[Laws 1911, S. B. No. 70, § 26.]

3494-J1. Title vests in district—Tax exemption.

SEC. 330j1. The title to property acquired under the provisions of this act shall vest in such drainage district, in its corporate name; said property shall be held by such district in trust for, and is hereby dedicated and set apart for, the uses and purposes set forth in this act, and shall be exempt from taxation, and the board of directors is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided.

[Laws 1911, S. B. No. 70, § 27.]

3494-K1. Corporate powers.

SEC. 330k1. The said board of directors is hereby authorized and empowered to take conveyances or assurances in the name of the drainage district for all property acquired by it under the provisions of this act, and to institute and maintain any and all actions, proceedings and suits, at law or in equity, necessary or proper in order fully to carry out the provisions of this act or to enforce, maintain, protect or preserve any or all rights, privileges and immunities created by this act or acquired in pursuance thereof.

[Laws 1911, S. B. No. 70, § 28.]

3494-L1. Per diem expenses—Salary.

SEC. 330l1. The directors shall each receive two and one-half dollars per day while attending meetings or while engaged in the business of the district, together with their actual and necessary expenses to be paid only on itemized statements sub-

scribed by such directors. The salary of the secretary shall not exceed five hundred dollars per annum.

[Laws 1911, S. B. No. 70, § 29.]

3494-M1. Annual election of directors.

SEC. 330m1. The regular election of directors of drainage districts shall be held on the first Tuesday after the first Monday in January of each alternate year, at which three directors shall be elected. The three persons receiving the highest number of votes shall be the directors for the next succeeding two years and until their respective successors are elected and qualified.

[Laws 1911, S. B. No. 70, § 30.]

3494-N1. Oath of office.

SEC. 330n1. Within ten days after receiving a certificate of election as hereinafter provided, each of said directors shall take and subscribe the official oath, and file the same together with his official bond in the office of the county clerk of the county where the organization of the district was effected, and thereupon assume the duties of his office.

[Laws 1911, S. B. No. 70, § 31.]

3494-O1. Bond of directors.

SEC. 330o1. Each director shall execute a bond in the penal sum of \$2,000 with sureties approved by the county Judge of the county where said organization was effected and file the same in the office of the county clerk of said county. Said bond shall be in the form prescribed by law for county officers, making the drainage district obligee therein.

[Laws 1911, S. B. No. 70, § 33.]

3494-P1. Office.

SEC. 330p1. The office of the drainage district shall be located in the county where the organization is effected, at some fixed place to be determined by the board of directors of the drainage district.

[Laws 1911, D. 318, § 33.]

3494-Q1. Notice of election.

SEC. 330q1. Fifteen days prior to any election held under the provisions of this act, subsequent to the organization of a drainage district, the secretary shall cause notices specifying the polling

place of each precinct to be posted in three public places in each precinct, giving the hour and place of holding the election, and at the same time shall post a general election notice of said election in the office of said drainage district.

[Laws 1911, p. 318, § 34.]

3494-R1. Judges of election.

SEC. 330r1. Prior to the time for posting said notices, the board of directors shall appoint three judges of election in each precinct, each of whom shall be a land owner within said precinct, and one of whom shall act as clerk of the election.

[Laws 1911, S. B. No. 70, § 35.]

3494-S1. Idem.

SEC. 330s1. If the board of directors fails to appoint judges or the appointees fail to attend at the hour designated for opening the polls on the morning of election, the voters of the precinct present at that hour may appoint one or more judges to supply the places of those absent.

[Laws 1911, S. B. No. 70, § 36.]

3494-T1. Election oaths.

SEC. 330t1. Any judge or clerk of election may administer and certify oaths required to be administered during the progress of an election. Before opening the polls each judge and clerk shall take and subscribe an oath faithfully to perform the duties imposed upon him by law. Any qualified elector of the precinct may administer and certify said oath.

[Laws 1911, S. B. No. 70, § 37.]

3494-U1. Polls open and close.

SEC. 330u1. The polls shall be opened at eight o'clock in the morning and be kept open until six o'clock of the afternoon of the day of election.

[Laws 1911, p. 319, § 38.]

3494-V1. Count of ballots.

SEC. 330v1. After the closing of the polls the judges of election shall forthwith proceed to count the ballots and make returns of the result of the election. It shall be the duty of the clerk forthwith to deliver the returns duly certified to the board of directors of the drainage district, together with the ballots cast.

[Laws 1911, S. B. No. 70, § 39.]

3494-W1. Canvass of the returns.

SEC. 330w1. The board of directors shall meet at the office of the drainage district on the first Monday after an election and canvass the returns. If at the time of the meeting the returns have been received from all the precincts, the board of directors shall then and there proceed to canvass the returns; if returns have not been received from all the precincts, the canvass shall be postponed from day to day until the returns have all been received or until six postponements have been had. The canvass shall be made in public by opening the returns and counting the votes of the district for each person voted for and for or against each question submitted at such election and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes for each office, and shall declare the result of the vote on any question submitted to the voters.

[Laws 1911, S. B. No. 70, § 40.]

3494-X1. Tie vote.

SEC. 330x1. In the event that at any regular or special election two or more persons shall receive the same number of votes and one is elected thereby, the election shall be determined by lot under direction of the county judge of the county in which the office of drainage district is kept.

[Laws 1911, p. 819, § 41.]

3494-Y1. Announcement of result of election.

SEC. 330y1. As soon as the result of any election held under the provisions of this act is declared, the secretary of the board of directors shall enter in the record of the board of directors and file with the county clerk of the county in which the office of said district is located, a statement of the result.

Said statement shall contain:

First—A copy of the published notice of said election.

Second—The names of the judges of election.

Third—The number of votes cast in the district and in each precinct of the district.

Fourth—The office to fill which each person was voted for.

Fifth—The number of votes cast in each precinct for each person.

Sixth—The number of votes cast in the district for each person.

Seventh—The names of the persons elected.

Eighth—The result of any question submitted to the voters at said election.

[Laws 1911, S. B. No. 70, § 42.]

3494-Z1. Certificate of election.

SEC. 330z1. The secretary shall forthwith deliver to each person elected a certificate of election, signed by the secretary and authenticated with the seal of the drainage district.

[Laws 1911, p. 320, § 43.]

3494-A2. Vacancies how filled.

SEC. 330a2. In case of a vacancy in the board of directors, by death, removal or inability from any cause, to properly discharge the duties of a director, the board of county commissioners of the county where the office of said director is located shall appoint a director who shall hold his office until the next regular election in said district and until his successor is elected and qualified.

[Laws 1911, p. 320, § 44.]

3494-B2. Treasurer of district.

SEC. 330b2. The county treasurer of the county in which the office of the drainage district is kept, shall be ex officio treasurer of the drainage district, and shall be liable on his official bond for the safety and disbursement of the funds of said drainage district, which may come into his hands.

[Laws 1911, p. 320, § 45.]

3494-C2. Duties of treasurer.

SEC. 330c2. Said treasurer shall collect, receive and receipt for all moneys belonging to said drainage district; it shall be the duty of the county treasurer of each county in which any drainage district is located in whole or in part to collect and receipt for all assessments levied as herein provided for in the same manner and at the same time and upon the same receipt as is required in the collection of taxes upon real estate for county purposes.

[Laws 1911, p. 320, § 46.]

3494-D2. Monthly remittances—Warrants.

SEC. 330d2. The county treasurer of each county comprising a portion only of a drainage district, shall on the first Monday of

each month remit to the treasurer of the drainage district all moneys belonging to said drainage district, and the board of directors is hereby authorized to pay all legal claims against said district by warrants drawn on the district treasurer, as in this act provided.

[Laws 1911, p. 320, § 47.]

3494-E2. Warrants to be signed and sealed.

SEC. 330e2. The treasurer of the drainage district shall pay out the funds of said district only upon warrants ordered by the board of directors of the drainage district, signed by its president and attested by its secretary, under the seal of the drainage district.

[Laws 1911, S. B. No. 70, § 48.]

3494-F2. Interest after presentation.

SEC. 330f2. When any warrants of a drainage district are presented to the treasurer and there are no funds in his hands to pay the same, he shall stamp the same in the same manner as ordinary county warrants are stamped and they shall draw interest at the rate of six per cent. per annum from the date of their presentation until paid.

[Laws 1911, S. B. No. 70, § 49.]

3494-G2. Verification of claims—Register.

SEC. 330g2. All claims against a drainage district shall be verified as is required in the case of claims against counties, and the directors and secretary of the drainage district are hereby authorized and empowered to administer oaths to the parties verifying said claims. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, giving the date and amount of the warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid, and all warrants shall be paid in the order of their presentation for payment to the district treasurer, and when paid be cancelled across the face. All warrants shall be drawn payable to the claimant or bearer.

[Laws 1911, S. B. No. 70, § 50.]

3494-H2. Registry—Vouchers.

SEC. 330h2. The secretary shall keep a registry of all warrants drawn by order of the board of directors showing the date,

amount, name of payee, and for what purposes drawn and no warrant shall be issued except upon an itemized voucher duly verified stating the services rendered or material furnished the district and by whom ordered or contracted.

[Laws 1911, S. B. No. 70, § 51.]

3494-J2. Report of treasurer.

SEC. 330j2. At each regular meeting of the directors of a drainage district and as much oftener as may be required, the treasurer shall report in writing the amount of money on hand, the amount received since his last report, and the amounts paid out, with a list of warrants presented since the last report; said report shall be sworn to and filed with the secretary of the board of directors.

[Laws 1911, S. B. No. 70, § 52.]

3494-K2. Annual estimate.

SEC. 330k2. The board of directors on or before July first in each year shall determine the amount of money required to meet the current expenses of the coming year, including cost of construction, maintenance, operating, and ordinary expenses, deficiency in the payment of expenses already incurred and bond interest unpaid, and shall fix the amount per acre necessary to be assessed against the lands of said district to pay the same, and shall cause an order to be entered that each tract of land within said district shall be assessed at said rate per acre.

[Laws 1911, S. B. No. 70, § 53.]

3494-L2. Assessments for interest.

SEC. 330l2. The board of directors at the same time shall enter an order showing the amount of bonded indebtedness, the principal or interest which will fall due during said coming year and the amount per acre necessary to pay the same, and shall cause an order to be entered that each tract of land within said district shall be assessed at said rate per acre for the purpose of paying said interest and principal of said bonds.

[Laws 1911, S. B. No. 70, § 54.]

3494-M2. Assessment book—Annual audit.

SEC. 330m2. Immediately after entering said orders the secretary of the board of directors shall prepare an assessment book showing by counties the several tracts of land in each county, the

number of acres in each tract, if known, and if not known noting that fact, the amount assessed against each tract, for current expenses and the amount for bonded indebtedness, and shall complete the same on or before the fifteenth day of July and on the first Tuesday in August in each year and from day to day thereafter, Sundays excepted, the board of directors shall sit to hear and determine complaints, and to correct errors in said assessment, until all complaints filed with the secretary, or presented to the board shall have had an opportunity to be heard, and shall have been determined.

[Laws 1911, S. B. No. 70, § 55.]

3494-N2. Returns to assessor.

SEC. 330n2. On or before the first day of September in each year the secretary shall transmit to the county assessor of each county a certified copy of so much of said assessment book as relates to land within the county of said county assessor, together with a certified copy of the order of the board of directors, and the county assessor shall attach his warrant for the collection of said amounts, and deliver said certified copies and said warrant to the county treasurer of his county, at the same time that the tax roll of the county is delivered and the county treasurer shall collect said assessments as taxes are collected, as a part of the tax roll for said year.

[Laws 1911, p. 323, § 56.]

3494-O2. Assessment book to district treasurer.

SEC. 330o2. The secretary of the board of directors shall deliver the assessment book, duly certified, together with a certified copy of the order of the board of directors, levying said assessment, to the district treasurer of said drainage district.

[Laws 1911, p. 323, § 57.]

3494-P2. Reference to revenue law.

SEC. 330p2. The laws of this state for the collection of general taxes including the laws for the sale of property for taxes and the redemption of the same shall apply and have full force and effect for the purposes of this act, and the provisions of this act for collecting the same shall be deemed and construed to be for the purpose of carrying into effect the police powers in this act granted to drainage districts for the construction and maintenance of drainage systems and shall not be construed as imposing a special tax under the taxing power.

[Laws 1911, p. 323, § 58.]

3494-Q2. Advertisement for bids.

SEC. 330q2. After adopting a plan for a drainage system and providing for the payment of the same, or a designated part thereof by assessment or bonds, the board of directors shall give notice, by publication not less than twenty days in a newspaper, published in the county where the office of the drainage district is kept, and in such other newspaper as may be deemed advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole, then the portion of said system to be constructed shall be described in the notice; the notice shall set forth where the plans and specifications may be seen, and that sealed proposals will be received at the office of the drainage district and a contract let to the lowest responsible bidder, giving the time and place for opening the proposals, which, at said time and place, shall be opened in public. The board of directors may enter into a contract with the lowest responsible bidder, for the construction of the whole or any portion of the work mentioned in the notice, or may reject any and all bids and re-advertise for proposals, or may proceed to construct the work under the supervision of the board of directors, and in that event all material shall be purchased of the lowest responsible bidders after proposals have been invited and notice thereof published as aforesaid.

[Laws 1911, p. 323, § 59.]

3494-R2. Contractors to give bond.

SEC. 330r2. The person or persons to whom a contract may be awarded shall execute a bond in the penal sum of not less than ten per cent. of the contract price, with surety to be approved by the board of directors, payable to the drainage district, conditioned for the faithful performance of the contract. All work shall be done under the direction and to the satisfaction of the engineer employed by the drainage district subject to approval by the board of directors.

[Laws 1911, p. 324, § 60.]

3494-S2. Special election on bond issue.

SEC. 330s2. For the purpose of constructing a drainage system and necessary works for any drainage district and acquiring the necessary property and rights therefor, for the purpose of paying the first year's interest upon the bonds herein authorized, and otherwise carrying out the provisions of this act the board of directors of any drainage district may estimate and determine the amount of money necessary to be raised for such purposes and is

hereby empowered to call a special election at which election shall be submitted to the electors of such drainage district possessing the qualifications prescribed by this act the question of whether or not the bonds of said district shall be issued in the amount so determined.

[Laws 1911, p. 224, § 61.]

3494-T2. Election notice.

SEC. 330t2. A notice of such election shall be given by posting notices in three public places in each election precinct in said district for at least twenty days, and by publication of such notice in some newspaper published in the county where the office of the drainage district is required to be kept, once a week for at least three successive weeks. The notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and said election shall be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this act governing the election of directors; *Provided*, That no informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds—Yes" or "Bonds—No."

[Laws 1911, p. 224, § 62.]

3494-U2. Bonds payable in series—Interest.

SEC. 330u2. If a majority of the votes cast is "Bonds—Yes," the board of directors shall immediately cause bonds in such amount to be issued payable in series as follows, to-wit:

At the expiration of eleven years, not less than five per cent. of the whole amount of said bonds; at the expiration of twelve years, not less than six per cent. of the whole amount of said bonds; at the expiration of thirteen years, not less than seven per cent. of the whole amount of said bonds; at the expiration of fourteen years, not less than eight per cent. of the whole amount of said bond; at the expiration of fifteen years, not less than nine per cent. of the whole amount of said bonds; at the expiration of sixteen years, not less than ten per cent. of the whole amount of said bonds; at the expiration of seventeen years, not less than eleven per cent. of the whole amount of said bonds; at the expiration of eighteen years, not less than thirteen per cent. of the whole amount of said bonds; at the expiration of nineteen years, not less than fifteen per cent. of the whole amount of said bonds;

at the expiration of twenty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage; that said bonds shall bear interest at the rate of not to exceed six per cent. per annum payable semi-annually on the first day of June and December of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected, and at such other place as the board of directors may designate in such bond.

[Laws 1911, S. B. No. 70, § 63.]

3494-V2. Details as to bonds and coupons.

SEC. 330v2. Said bonds shall be of the denomination of one hundred dollars or five hundred dollars, negotiable in form, executed in the name of the district and signed by the president and secretary, and the seal of the district shall be affixed thereto. Said bonds shall be numbered consecutively, and bear date the day of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their face that they are issued by the authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser.

[Laws 1911, S. B. No. 70, § 64.]

3494-W2. Bonds under 20 years.

SEC. 330w2. Any drainage district may, by a majority vote of the legal electors of said district, provide for the issuance of bonds that will mature in any number of years less than twenty, and arrange for the payment thereof, in series as above provided.

[Laws 1911, S. B. No. 70, § 65.]

3494-X2. Additional issue of bonds—Lien.

SEC. 330x2. When the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued, submitting the question, at special election, to the qualified voters of said district, otherwise complying with the provisions of this section in respect to an

original issue of bonds. The lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue.

[Laws 1911, S. B. No. 70, § 66.]

3494-Y2. Sale of bonds.

SEC. 330y2. The board of directors may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money to carry out the objects and purposes of this act. Before making any sale the board shall, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Denver, and in any other newspaper, at discretion.

[Laws 1911, S. B. No. 70, § 67.]

3494-Z2. Sealed proposal for bonds.

SEC. 330z2. The notice shall state that sealed proposals will be received by the board of directors at the office of the drainage district, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five per cent. of the face value thereof.

[Laws 1911, S. B. No. 70, § 68.]

3494-A3. Annual assessment to pay bonds.

SEC. 330a3. Said bonds and the interest thereon shall be paid from an annual assessment upon the real property within the drainage district, and the real property within the district shall be and remain liable to be assessed for such payments as herein provided.

[Laws 1911, S. B. No. 70, § 69.]

3494-B3. Right of way.

SEC. 330b3. The board of directors shall have the power to construct the said works across any water courses, street, avenue, highway, railway, canal or ditch which the route of such drainage system or any branch thereof may intersect or cross; and if any railroad company and said board, or the owners and controllers of

said property, thing or franchise so to be crossed, or the owner of land necessary for said drainage district, and the board of directors, can not agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided by law in respect to the taking of land for public uses, by the exercise of the right of eminent domain, the right to the exercise of which is hereby conferred on drainage districts.

[Laws 1911, S. B. No. 70, § 70.]

3494-C3. Right of way over state land.

SEC. 330c3. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain drainage systems and works, in, over, through, across or upon any of the lands which are now, or may be the property of the state.

[Laws 1911, S. B. No. 70, § 71.]

3494-D3. Directors not to be interested in contracts.

SEC. 330d3. No director or officer of a district shall be interested directly or indirectly in any manner in any contract awarded or to be awarded by the board or in the profits thereof; nor shall receive any gratuity or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and upon conviction shall be punished by a fine not exceeding five hundred dollars (\$500) or by imprisonment in the penitentiary not exceeding five years or less than one year, and such conviction shall work a forfeiture of his office.

[Laws 1911, p. 327, § 72.]

3494-E3. Property in certain water.

SEC 330e3. Water gathered or developed by drainage systems or improvements shall be the property of the drainage district constructing said system or improvement.

[Laws 1911, p. 328, § 73.]

3494-F3. Vacancies.

SEC. 330f3. In the event that a person elected as director of a drainage district shall fail or refuse to qualify within the time prescribed in this act, a vacancy shall exist and the board of county commissioners of the county where the office of the drainage district is located shall appoint a director who shall hold the office until the next regular district election, and upon filing

his oath and bond as in this act provided, the term of office of the director whose successor was to be elected shall end.

[Laws 1911, p. 328, § 74.]

3494-G3. Judicial notice.

SEC. 330g3. In all actions, suits and judicial proceedings, in any court of this state, the court shall take judicial notice of the organization and existence of any drainage district of this state, hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in section 17 of this act; and a certified copy of said order shall be prima facie evidence in all actions, suits and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters and proceedings therein recited and set forth; and any such drainage district, in regard to which any such order may hereafter be entered, and such certified copy thereof, so filed for record, and which thereafter has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office and the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing drainage district within the meaning of this act; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this act or otherwise.

[Laws 1911, p. 328, § 75.]

3494-H3. Annexation of new acreage.

SEC. 330h3. Upon the petition of the owner thereof and the payment of a sum per acre equal to the aggregate of all assessments per acre theretofore made upon the lands comprising such district, the board of directors may authorize the inclusion of any tract of land contiguous to the existing boundaries of said district and capable of being drained by said drainage system and thereupon said land shall become liable for all future assessments which may be levied for drainage purposes within said drainage district; and the costs of any such proceeding for the inclusion of land shall be borne by the applicant.

[Laws 1911, S. B. No. 70, § 76.]

3494-J3. Judicial proceedings same as in case of irrigation districts.

SEC. 330j3. The board of directors of a drainage district organized under the provisions of this act may commence special proceedings in the district court of the county where the office of the drainage district is kept, in and by which the proceedings of said board of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold or disposed of, may be judicially examined, approved and confirmed, and the proceeding thereon shall be in conformity with the law regulating like proceedings for the examination, approval and confirmation of the organization and bonds of irrigation districts.

[Laws 1911, S. B. No. 70, § 77.]

3494-K3. Voluntary contract for drainage district.

SEC. 330k3. Whenever the owners of lands which may require a combined system of drainage shall unanimously and mutually agree upon a system of drainage and the character of work necessary to be done to drain their lands and the amount of money each shall contribute towards said proposed works; they may reduce their agreement to writing specifying the boundary lines of said voluntary district and the lands therein, in 160 acre tracts, or smaller tracts if necessary, giving the names of the owners of each tract of land and specifying the work which they propose shall be done, and the name of the drainage district, and also naming three persons among their number who shall act as directors until the annual election, and may agree upon any other lawful matter or thing which they may deem pertinent to the work proposed.

[Laws 1911, p. 329, § 78.]

3494-L3. Approval of voluntary district by county commissioners.

SEC. 330l3. They shall submit such agreement to the board of county commissioners of the county wherein the major part of the lands proposed to be included in such district may be situated, and shall submit therewith a plat of the land giving a general description of the same, and the said board of county commissioners as soon thereafter as may be practicable shall carefully consider all questions involved, and shall make a personal inspection of the land proposed to be included in said voluntary district or may employ some competent engineer or surveyor to examine and report to said board on the same and the expense of such surveyor

or engineer, including any expense that the county commissioners may incur in the examination of such project shall be paid by the parties to such voluntary agreement, and the board of county commissioners may require a deposit to be made with the county treasurer of the county to protect the county against such expense. If such board of county commissioners shall become satisfied that the plan proposed is practicable and will be conducive to the public health, convenience, utility or welfare, and that the agreement submitted is fair and equitable in all respects considering the benefits which the respective lands will receive from such voluntary drainage system, then the board of county commissioners shall enter an order upon their records approving such agreement and shall file the same with the county clerk with the accompanying plat in the office of the county clerk of said county, and if such district extends into more than one county a certified copy of the agreement and plat, together with a certified copy of the said order of the board of county commissioners shall be filed by the parties to such agreement with the county clerk of such other county or counties, and thereupon the said drainage district shall be fully organized and established and shall have all the powers of drainage districts, and such directors so named in said agreement shall then possess all the powers and proceed in like manner as before designated in the case of directors of districts organized by petition, and the agreement herein provided for shall constitute a charter of authority of such voluntary district and all lands subscribed to and voluntarily included in said district shall be considered as a unit or but one tract of land in the determination of any question or right or duty as between said voluntary district and any lands outside thereof, whether lying above or below said district or adjacent thereto.

[Laws 1911, S. B. No. 70, § 79.]

3494-M3. Petition to dissolve.

SEC. 330m3. Whenever a majority of the owners of land within a drainage district representing also a majority of the whole number of acres of land within the district, shall petition the board of directors to call a special election for the purpose of submitting to the qualified electors of said drainage district a proposition to dissolve such district, it shall be the duty of such board of directors, upon proof that all claims and bills of the district of every kind or nature whatsoever have been fully paid and satisfied, to call an election for the purpose of submitting the question of the dissolution of such district to the qualified voters thereof and to cause a notice setting forth the object of such elec-

tion, to be posted in the office of the district and in six public places within such district and to be published in some newspaper of general circulation and published in each county in which any portion of said district may lie, for a period of thirty days prior to said election, which said notice shall set forth the time and place for holding said election in each precinct within said district. It shall also be the duty of the board of directors to prepare ballots to be used at such elections on which shall be written or printed the words: "For dissolution" and "Against dissolution," and to appoint judges and clerks of elections as in other elections of the district. No district shall be dissolved which shall have claims, bills, bonds or indebtedness outstanding or unpaid and the attempted dissolution of such a district shall be null, void and of no force and effect.

[Laws 1911, S. B. No. 70, § 80.]

3494-N3. Order of dissolution.

SEC. 330n3. The board of directors shall, upon the day specified in the notice of election as the day for the canvassing of the vote of such election, proceed to canvass the votes cast at said election and if it shall appear from such canvass that a majority of the ballots cast at said election were "For dissolution" then the board of directors shall forthwith make and enter in their records an order declaring said district to be duly dissolved and disorganized, which said order shall contain a complete copy of said petition for dissolution, including the signatures thereto attached, and a duly authenticated copy of the published notice of such election together with copies of the publisher's affidavit of publication, and shall state that an election was called and set for the.....day of.....A. D....., that on said day said election was held and that so many votes (stating the number) were cast for dissolution and so many votes were cast against dissolution, and said board of directors shall cause a copy of said order, duly certified by the president and attested by the secretary of the board of directors under the seal of the district, to be filed for record in the office of the county clerk and recorder of each county within which any portion of such district shall extend or lie and it shall be the duty of said county clerks and recorders to forthwith file and record said certified copies, whereupon said district shall be dissolved and shall cease to exist. Should it appear upon the canvass of said vote so cast at said election, that a majority of the votes were against dissolution, then the board of directors shall declare the proposition lost and shall thereupon enter an order to that effect in the

records of the district, but shall not file such order with the county clerks and recorders of the counties into which such district shall extend.

[Laws 1911, S. B. No. 70, § 81.]

3494-03. Repeal with saving clause.

SEC. 33003. That an act entitled "An act in relation to drainage districts," approved April 24, 1909, be and the same is hereby repealed, providing nothing herein contained shall invalidate or affect any act or proceeding done or pending thereunder; but all such pending proceedings may be continued and concluded under such repealed act the same as if this statute had not been adopted or may be continued or concluded under the provisions of this act; *And, provided, further,* That nothing herein contained shall impair the organization rights, powers and privileges of any drainage district organized under said act so repealed.

[Laws 1911, S. B. No. 70, § 82.]

IX. OFFENSES.

Section.

3495. Cutting or breaking gate, bank, flume, etc.—Penalty.

3496. Jurisdiction of justice of the peace.

3497. Penalty for interfering with adjusted headgates.

3498. Jurisdiction of justice of the peace.

3495. Cutting or breaking gate, bank, flume, etc.—Penalty.

SEC. 331. Any person or persons who shall knowingly and wilfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir in which such person or persons may be a joint owner, or the property of another, or in the lawful possession of another or others, and used for the purposes of irrigation, manufacturing, mining or domestic purposes, with intent maliciously to injure any person, association or corporation, or for his or her own gain, unlawfully, with intent of stealing, taking or causing to run or pour out of such ditch, canal, reservoir, feeder or flume, any water for his or her own profit, benefit or advantage, to the injury of any other person, persons, association or corporation, lawfully in the use of such water or of such ditch, canal, reservoir, feeder or flume, he, she or they so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five dollars nor more than three hundred dollars, and may be imprisoned in the county jail not exceeding ninety days.

[G. S., § 1759; Laws 1881, p. 163, § 1.]

[Penalty for damaging bridge or flume. Section 994.]

3496. Jurisdiction of justices of the peace.

SEC. 332. Justices of the peace shall have jurisdiction of all offenses under the provisions of this act, saving to any party defendant the right to be tried by a jury as in other criminal cases before such justices, now provided for by law; and also the right to appeal in manner and form as by law, now, or hereafter to be provided for by law, in criminal cases before such justices.

[G. S. § 1760. Laws 1881, p. 163, § 2.]

[For provisions governing appears see section 3869.]

3497. Penalty for interfering with adjusted headgates.

SEC. 333. Every person who shall wilfully and without authority open, close, change or interfere with any headgate of

any ditch, or any water box or measuring device of any ditch for the receiving or delivery of water, after the headgate of the ditch has been adjusted by and is in the control of the water commissioner, or after such water box or measuring device has been adopted by the ditch officer in charge, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum not more than \$300.00, or imprisoned in the county jail not exceeding sixty days, or both such fine and imprisonment, in the discretion of the court.

Any person who shall be found using water taken through any such headgate, water box or measuring device so unlawfully interfered with, shall prima facie be deemed guilty of a violation of this section.

[Laws 1901, p. 196, § 1; amending G. S., § 1755; Laws 1879, p. 103, § 44.]

3498. Jurisdiction of justice of the peace.

SEC. 334. Justices of the peace shall have jurisdiction to hear, try and determine actions brought for violations of this act, subject to the right of appeal as provided for in case of assault and battery.

[Laws 1901, p. 197, § 2.]

[For appeal in cases of assault and battery see section 3369.]

[For bribery of water commissioner see section 1723.]

[Penalty for failure to cover ditch, see section 3243.]

[Penalty for polluting stream, see section 1817.]

[Penalty for allowing water to waste, see section 3240.]

[Unlawful to cut trees which conserve the snow. Section 2626.]

X. STATE CANALS AND RESERVOIRS AND THE CONTROL THEREOF.**Section.**

- 3499. Penitentiary commissioners may locate and construct.
- 3500. State engineer shall survey, lay out and locate.
- 3501. Rights and powers given board.
- 3502. Title shall vest in state.
- 3503. Contract for and lease water rights.
- 3504. Aiding in the construction.
- 3505. Board of control of canal No. 1.
- 3506. Control turned over to land board.
- 3507. Use of water—Lease of lands.
- 3508. Rights and powers of board of control.
- 3509. Establish annual charges for use of water.
- 3510. Title to canal in state.
- 3511. Board constructs laterals.
- 3512. Certificates received in lieu of money for charges.
- 3513. State board of control have traveling expenses.
- 3514. Location of Mesa county state ditch.
- 3515. Property of the state.
- 3516. Board of penitentiary commissioners may issue and sell certificates.
- 3517. Construction of ditch.
- 3518. Right of way.
- 3519. Cash subscriptions, how used.
- 3520. Convicts returned to penitentiary, when.
- 3521. Contracts for transportation.
- 3522. Superintendent of construction—Salary.
- 3523. Deputy warden in charge of convicts.
- 3524. Manager of ditch—Salary.
- 3525. Lease of water rights.
- 3526. State engineer locate canal No. 3.
- 3527. Feeders for South Platte and Arkansas.
- 3528. Property of the state.
- 3529. Coal creek reservoir—Rights to water.
- 3530. Property of state—Delivery of water.
- 3531. Shall not impair vested rights.
- 3532. Damaging reservoir a misdemeanor.
- 3533. Reservoir—Apishapa creek.
- 3534. Location.
- 3535. Board of construction.
- 3536. Property of state.
- 3537. Sale and lease of water.
- 3538. Moneys paid to state treasurer.
- 3539. Reservoir Hardscrabble creek.
- 3540. Plans and specifications.
- 3541. Board of construction.
- 3542. Property of state—Disposition of water.
- 3543. Acquired rights not impaired.
- 3544. Maintenance and repair.
- 3545. Penalty for damaging reservoir.
- 3546. Reservoir—Saguache creek.
- 3547. Board of construction.

- 3548. Property of state—Disposition of water.
 - 3549. Acquired rights not impaired.
 - 3550. Penalty for damaging reservoir.
 - 3551. Reservoir—Monument creek.
 - 3552. Property of state—Disposition of water.
 - 3553. Acquired rights not impaired.
 - 3554. Penalty for damaging reservoir.
 - 3555. Reservoir Chaffee county.
 - 3556. Board of construction—Powers of board.
 - 3557. Property of state—Management—Sale of water.
 - 3558. Acquired rights not impaired.
 - 3559. Penalty for damaging reservoir.
 - 3560. Control of Boss Lake reservoir.
 - 3561. Land board control ditches and reservoirs.
 - 3562. County control of reservoirs.
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3499. Penitentiary commissioners may locate and construct.

SEC. 335. That, for the purpose of reclaiming, by irrigation, state and other lands, and for the purpose of furnishing work for the convicts confined in the state penitentiary, the board of commissioners of the state penitentiary is hereby authorized to locate, acquire and construct, in the name of and for the use of the state of Colorado, ditches, canals, reservoirs and feeders, for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined, or that may be confined, as convicts in the state penitentiary at Canon City.

[Laws 1889, p. 285, § 1.]

3500. State engineer shall survey, lay out and locate.

SEC. 336. The state engineer, under the direction of the board, shall survey, lay out and locate a ditch or canal upon the most feasible route on either side of the Arkansas river, which said ditch or canal shall be of sufficient capacity to cover at least thirty thousand acres of good arable land between Canon City and Pueblo; *Provided*, That work shall only be commenced and performed upon one main ditch, canal, reservoir or feeder at a time; that a second shall not be commenced until the completion of the first.

[Laws 1889, p. 285, § 2.]

3501. Rights and powers given board.

SEC. 337. The said board is hereby given all the rights and

[*Only material sections of the original acts establishing ditches and reservoirs are printed. In many cases later appropriations have been made but in most instances the work has been abandoned.]

powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of said ditches, canals, reservoirs or feeders.

[Laws 1889, p. 286, § 2.]

3502. Title shall vest in state.

Sec. 338. That the title to all ditches, canals, reservoirs or feeders, so constructed under this act, shall vest and remain in the state of Colorado, and the proceeds thereof shall be paid into the state treasury.

[Laws 1889, p. 286, § 4.]

3503. Contract for and lease water rights.

Sec. 339. That when any part of any ditch, canal, reservoir or feeder shall be constructed under this act, said board of penitentiary commissioners may contract for and may lease water rights, upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state, to such individuals or corporations as may desire to lease the same.

[Laws 1889, p. 286, § 5.]

[The act referred to above includes sections 3499-3504.]

[Is above section amended by sections 3561 and 3562?]

3504. Aiding in the construction.

Sec. 340. That for the purpose of aiding in the construction of said ditches, canals, reservoirs and feeders, the said board is hereby authorized to receive subscriptions and advancements of money from persons owning land along the line of said proposed ditches, canals, reservoirs and feeders, or persons desiring the construction of the same, and to issue receipts or certificates to such person or persons so advancing money for the amount thereof, which receipt or certificate shall draw interest at the rate of seven per cent. per annum, and both principal and interest shall be payable in water to be taken from said ditches, canals, reservoirs or feeders, under such rules and regulations as may be adopted by said board and the state engineer, and approved by the governor of the state.

[Laws 1889, p. 286, § 6.]

3505. Board of control canal No. 1—Duties.

Sec. 341. There is hereby created a board to be known as

"The board of control of state canal No. 1 and reservoirs connected therewith." The said board shall be composed of the lieutenant governor, who shall be chairman, the state engineer and the warden of the penitentiary. The secretary of the state board of land commissioners shall be secretary of said board of control. Said board is hereby charged with the duty of securing the early completion of state canal No. 1, and reservoirs connected therewith and of the operation and maintenance of the same as herein provided.

[Laws 1893, p. 441, § 1.]

[Sections 2-7 of the above act have performed their function and are therefore not printed.]

3506. Board of land commissioners assume control.

SEC. 342. Upon completion of said canal and its acceptance and approval, as hereinbefore provided, the said board of control of state canal No. 1 and reservoirs connected therewith, shall turn over the said canal, together with all drawings, specifications, reports and records pertaining to said canal and the action of said board of control, to the state board of land commissioners; whereupon the state board of land commissioners shall assume control of said canal and shall thereafter control, operate and maintain the same subject to such provisions of law as may hereafter be made and established.

[Laws 1893, p. 445, § 3.]

[See also section 3561.]

3507. Use of water—Lease of lands.

SEC. 343. It shall be the duty of the state board of land commissioners to cause the waters carried in the state canal No. 1 and reservoirs connected therewith to be applied to the irrigation of the state lands and all other lands lying under said canal at the earliest convenient and practicable times, and as a means among others to effect such use of water, the board of land commissioners are authorized to offer numerous portions of said lands for lease at such reasonable prices, and for such periods, not exceeding twenty years, as will be conducive to the rapid settlement of such lands and the early use of such waters.

[Laws 1893, p. 445, § 9.]

3508. Rights and powers of board of control.

SEC. 344. The said board of control of state canal No. 1 and reservoirs connected therewith is here given all the rights and powers that an individual or corporation now has, or may here-

after have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of such canal.

[Laws 1893, p. 445, § 10.]

3509. Establish annual charges for carriage of water.

SEC. 345. It shall be the duty of the state board of land commissioners to establish from time to time reasonable annual charges for the carriage of waters or sell perpetual rights of water if deemed by it more expedient.

[Laws 1893, p. 446, § 11.]

[Is the above section superseded by section 3562?]

3510. Title to canal in state.

SEC. 346. The title to the said canal shall vest and remain with the state of Colorado, and any money received for the carriage of water therein shall be devoted to the maintenance and operation of such canal, and surplus over and above the cost of operation, and maintaining such canal, shall be converted into the state treasury and applied by the state treasurer to meeting the certificates of indebtedness herein provided for and interest thereon.

[Laws 1893, p. 446, § 12.]

3511. Board construct laterals.

SEC. 347. It shall be the duty of the said board of land commissioners to construct from time to time and as rapidly as may seem to such board advisable, lateral ditches and the necessary appurtenances thereto, for supplying the lands of the state lying under said canal with water for irrigation, and to see that all of such lands belonging to the state are brought under cultivation within a reasonable time.

[Laws 1893, p. 446, § 13.]

3512. Certificates received in lieu of money for charges.

SEC. 348. Any receipts or certificates heretofore issued in return for subscriptions and advancement of money by persons owning land along the line of state canal No. 1, and reservoirs connected therewith shall be received in lieu of money for the lawful and reasonable charges for the carriage of water in the said canal, and all of the certificates hereafter issued as in said canal or for perpetual water rights thereunder.

[Laws 1893, p. 446, § 14.]

3513. State board of control have traveling expenses.

SEC. 349. The members of the state board of control of state canal No. 1, and reservoirs connected therewith shall be entitled to their reasonable traveling expenses while performing the duties herein laid upon them for which amounts the auditor shall draw warrants upon the state treasurer, when such amounts shall be duly certified to him by the secretary of the said board of control.

[Laws 1892, p. 446, § 15.]

3514. Location of Mesa county state ditch.

SEC. 350. The state engineer under the direction of the board of penitentiary commissioners shall lay out, survey and locate a ditch or canal and laterals, reservoirs and feeders as may be necessary or expedient so as to cover all the land practicable in the Grand valley in Mesa county. The headgate of the said ditch or canal shall be located in the Hogback canon, and the water for said canal shall be taken out of the Grand river.

[Laws 1891, p. 335, § 1.]

3515. Property of the state.

SEC. 351. The said ditch shall be known as the Mesa county state ditch, and during the construction of the same and when constructed shall be the property of the state of Colorado and all revenues derived therefrom shall be turned into the state treasury.

[Laws 1891, p. 336, § 2.]

3516. Board of penitentiary commissioners may issue and sell certificates.

SEC. 352. It shall be the duty of the board of penitentiary commissioners after said ditch is surveyed to issue and sell for cash certificates bearing seven per cent. interest from the date of the issuance thereof, the principal and interest of which shall be receivable by the state of Colorado as cash for water to be taken out of said canal under such rules and regulations as may be adopted by said board and state engineer and the governor of the state.

[Laws 1891, p. 336, § 3.]

3517. Construction of ditch.

SEC. 353. That after the subscription of fifty thousand dollars for said certificates has been received by said board and twenty per cent. of the same has been paid in, it shall be the duty

of said board to commence the construction of said ditch, and in order to construct the same the said board of penitentiary commissioners shall have the power and authority and it shall be their duty to select from the able-bodied convicts confined in the state penitentiary "As many as are not otherwise employed" none of whom shall be under life sentence, and transport the said convicts to a general headquarters for the construction of said ditch where said board shall make suitable provisions for the safe keeping of said convicts and said convicts shall be used under proper guard for the construction of said ditch.

[Laws 1891, p. 335, § 4.]

3518. Right of way.

SEC. 354. The said board shall have the right and power to purchase, condemn or otherwise lawfully acquire a right of way for the said canal as provided in other cases and for said purpose may sue in the name of the people of the state of Colorado.

[Laws 1891, p. 336, § 5.]

3519. Cash subscriptions, how used.

SEC. 355. Said board shall have the power to use all cash subscriptions for the purpose of purchasing provisions, tools, teams, etc., for the construction of said ditch or may receive at cash valuation groceries, vegetables, teams, tools, labor and other things necessary in constructing said ditch, on subscription for certificates as provided in section three of this act.

[Laws 1891, p. 336, § 6.]

[Section 3 referred to is section 3516.]

3520. Convicts returned to penitentiary, when.

SEC. 356. Five days before the expiration of the term of confinement of any convict or convicts employed in the construction of said ditch shall expire, he or they shall be transported to the penitentiary at Canon City and others shall be taken to said work in his or their places.

[Laws 1891, p. 337, § 7.]

3521. Contracts for transportation.

SEC. 357. Said board of penitentiary commissioners shall have the power and authority to obtain or make a contract with any railroad company for rates for transporting prisoners to and from said work; or for transporting material, goods, wares or merchandise to be used in the construction of said ditch; and in

advertising for bids for general penitentiary provisions and supplies, as now provided by law, may stipulate that such proportion of said provisions and supplies as may be necessary for the sustenance of convicts employed in the construction of said Mesa county state ditch shall be delivered at the general headquarters of said ditch.

[Laws 1891, p. 335, § 8.]

3522. Superintendent of construction—Salary.

SEC. 358. Said board may select one of their number who shall have immediate charge of the construction of said ditch and shall give his personal attention to the same and when so selected the said member of said board shall receive in addition to the present compensation two thousand, five hundred (2,500) dollars per year, payable out of the funds derived from the sale of certificates as provided in section three of this act.

[Laws 1891, p. 337, § 9.]

3523. Deputy warden in charge of convicts.

SEC. 359. The warden of said penitentiary may appoint a deputy warden who shall have the same power and authority as he now possesses who shall be placed in charge of the convicts employed in the construction of said canal.

[Laws 1891, p. 337, § 10.]

3524. Manager of ditch—Salary.

SEC. 360. After said canal is fully completed said convicts shall be returned to the penitentiary at Canon City and the governor shall appoint with the advice and consent of the senate a competent person who shall manage and superintend said ditch for and on behalf of the state and who shall receive fifteen hundred dollars per year salary to be paid out of the income from said ditch upon the order of board of penitentiary commissioners.

[Laws 1891, p. 337, § 11.]

3525. Lease of water rights.

SEC. 361. When said ditch or any of its reservoirs or feeders shall be constructed under this act said board of penitentiary commissioners may contract for the carriage and delivery of water, and may lease water rights upon such terms and under such rules and regulations as may be adopted by said board and approved by

the governor of the state to such individuals or corporations as may desire to lease the same.

[Laws 1891, p. 337, § 12.]

3526. State engineer locate canal number three.

SEC. 362. The state engineer, under the direction of said board of control, shall survey, locate and lay out a tunnel or canal which shall be known as "State Canal No. 3," commencing at the most feasible point on the Gunnison river below the mouth of the Cimarron river; thence in a westerly direction to the Uncompahgre river valley, thence with laterals running in various directions from said main canal to cover and redeem the greatest body of arable land in said counties of Montrose and Delta.

[Laws 1901, p. 369, § 2.]

[Canal No. 3 established by the act of 1901 was ceded to the United States by section 6928.]

3527. Feeders for South Platte and Arkansas.

SEC. 363. That there is hereby appropriated out of any funds in the state treasury belonging to the internal improvement fund not otherwise appropriated the sum of three thousand dollars, or so much thereof as is necessary to defray the necessary expenses of a preliminary survey and investigation of the sources of the Grand, Laramie and North Platte river systems, with reference to turning the unappropriated waters thereof eastward, and causing them to flow into and through the tributaries of the South Platte and Arkansas river systems for the purpose of irrigation and other beneficial uses.

[Laws 1889, p. 208, § 1.]

3528. Property of the state.

SEC. 364. That the said ditches, canals and waterworks, and the waters when so diverted, shall be the property of the state, and the waters so supplied shall be turned into the said South Platte and Arkansas rivers and their tributaries for the purpose of supplying deficiencies of water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said streams. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such waters to such ditches, canals and reservoirs, according to their several appropriations, decrees of court, capacities and necessities.

[Laws 1889, p. 210, § 4.]

[Survey in Boulder county. L. '89, p. 46.]

[Survey near Walsenburg, L. '07, p. 134.]

3529. Coal Creek reservoir—Rights of water.

SEC. 365. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of twenty thousand (20,000) dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Coal creek, upon or adjacent to sections twenty, twenty-eight, or thirty-four, township four south, range sixty-five west, in the county of Arapahoe, to store the water of floods for the purpose of irrigation and other beneficial uses; *Provided*, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be re-vested in the state; *And, provided, further*, That all citizens of the state shall have free and equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law for the protection of the property.

[Laws 1889, p. 215, § 1.]

3530. Property of state—Delivery of water.

SEC. 366. That the said reservoir and waterworks, and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be turned into Coal creek or canal, for the purpose of supplying water for appropriations heretofore made, or hereafter to be made, in the order of such appropriation, by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs, according to their several appropriations, decrees of court, capacities and necessities.

[Laws 1889, p. 217, § 6.]

3531. Shall not impair vested rights.

SEC. 367. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the irrigation laws of the state of Colorado.

[Laws 1889, p. 217, § 7.]

3532. Damaging reservoir a misdemeanor.

SEC. 368. Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be

deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand (1,000) dollars, or by imprisonment in the county jail not exceeding one year.

[Laws 1889, p. 217, § 8.]

3533. Reservoir—Apishapa creek.

SEC. 369. That there is hereby appropriated out of any moneys in the state treasury belonging to the internal improvement permanent fund and any moneys which may be hereafter credited to said fund not otherwise appropriated the sum of fifteen thousand (15,000) dollars for the construction of a reservoir on the Apishapa creek in the county of Las Animas, for the storage of the surplus waters of said creek, to pay for surveying the same.

[Laws 1891, p. 345, § 1.]

3534. Location.

SEC. 370. Said reservoir shall be erected at some suitable place, to be determined by the state engineer, west of the Denver and Rio Grande railway, on or near the Apishapa creek.

[Laws 1891, p. 346, § 2.]

3535. Board of construction.

SEC. 371. The governor, secretary of state and state engineer are hereby constituted a board, under whose supervision and control said reservoir shall be located and constructed. Said board shall take charge of said reservoir, until otherwise provided by law, and make all proper regulations for the sale or disposal of the waters stored therein.

[Laws 1891, p. 346, § 3.]

3536. Property of state.

SEC. 372. Said reservoir shall be the property of the state, and all lands covered by said reservoir, or required for the use of ditches shall be vested in the state of Colorado, prior to the letting of contracts for construction of such reservoir or ditches.

[Laws 1891, p. 346, § 4.]

3537. Sale and lease of waters.

SEC. 373. Upon the completion of said reservoir the board appointed in section 3 of this act shall take such steps as shall be necessary to sell or lease such waters as will in the judgment of said board bring in the most revenue to the state.

[Laws 1891, p. 346, § 7.]

[Section 3 referred to is section 3535.]

3538. Moneys paid to state treasurer.

SEC. 374. All moneys received from the sale or leasing of the water stored in said reservoir and from any water rights sold, either in connection with lands belonging to the state or otherwise, shall be paid to the state treasurer and by him credited to the internal improvement permanent fund.

[Laws 1891, p. 347, § 8.]

3539. Reservoir—Hardscrabble creek.

SEC. 375. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated the sum of ten thousand (10,000) dollars, or as much thereof, as may be necessary, as hereinafter provided for the construction of a reservoir, or reservoirs, at the most convenient and suitable place, or places to be selected by the state engineer in township 21 range 69 west in the county of Custer, to store the waters of the Hardscrabble creek, and its tributaries for the purpose of irrigation, and other beneficial uses.

[Laws 1891, p. 350, § 1.]

3540. Plans and specifications.

SEC. 376. As soon as practicable after the passage and approval of this act, the state engineer shall make the necessary arrangements for measuring the flow of water in said Hardscrabble creek with a view of constructing a reservoir or reservoirs, of sufficient capacity to hold a part or a sufficient quantity of the waters of Hardscrabble creek, and its tributaries above said reservoir or reservoirs. Said state engineer, shall thereafter calculate and determine the required capacity of such reservoir, or reservoirs, to stow the waters flowing in said creek or so much thereof as may be necessary during the months of April, May, and June of each year, and prepare plans and specifications thereof.

[Laws 1891, p. 350, § 2.]

3541. Board of construction.

SEC. 377. The governor, state engineer, and attorney general, shall be, and hereby are constituted a board for the purpose of constructing said reservoir, or reservoirs, and taking charge of same until otherwise provided by law.

[Laws 1891, p. 350, § 3.]

3542. Property of state—Disposition of water.

SEC. 378. That the said reservoir, or reservoirs, and water-works and the waters when so collected, and stored shall be the property of the state, and the water so supplied shall be turned into Hardscrabble creek or canals for the purpose of supplying water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person, or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs according to their several appropriations, decrees of court, capacities and necessities.

[Laws 1891, p. 350, § 6.]

3543. Acquired rights not impaired.

SEC. 379. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired under, or by virtue of the irrigation laws of the state of Colorado.

[Laws 1891, p. 350, § 7.]

3544. Maintenance and repair.

SEC. 380. When said reservoir or reservoirs, are completed, together with the approaches, the expense of maintaining and keeping them in repair shall be by persons using and having a direct benefit from the use of the water therefrom and persons to whom a greater supply of water is received by the storage of water in the aforesaid reservoir or reservoirs.

[Laws 1891, p. 350, § 8.]

[Is above section superseded by section 3562?]

3545. Penalty for damaging reservoir.

SEC. 381. Any person interfering with or damaging said reservoir or reservoirs, or parts, or appurtenances thereof, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one thousand (1,000) dollars or by imprisonment in the county jail not exceeding one year.

[Laws 1891, p. 350, § 9.]

3546. Reservoir—Saguache creek.

SEC. 382. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement in-

come fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of thirty thousand dollars or so much thereof as may be necessary, for the construction of one or more reservoirs, as is hereinafter provided, on or near the head-waters of Saguache creek, in Saguache county, Colorado, at some suitable point or points within or near township forty-three (43) north of range two (2) east N. M. P. M., or township forty-three (43) north of range three (3) east N. M. P. M. or both to be used for the conservative, storage and distribution of flood waters and waters flowing in said creek for the irrigation of lands which are or hereafter can be irrigated by water taken from said Saguache creek; *Provided*, That no part of said appropriation shall be used for the purchase of land.

[Laws 1891, p. 354, § 1.]

3547. Board of construction.

SEC. 383. The governor, state engineer and chairman of the board of county commissioners of Saguache county shall be and hereby are constituted a board for the purpose of constructing said reservoir or reservoirs, and shall have power if after the examination and measurements made by the state engineer, as hereinafter provided, they shall conclude that two reservoirs could be constructed with the money hereby appropriated, and that they would more efficiently than one subserve the objects hereby sought to be accomplished, to cause said two reservoirs to be constructed; *Provided*, That the total cost of said two reservoirs shall not exceed the sum of thirty thousand dollars hereby appropriated; *And, provided, further*, That if after proper examination and survey the board shall determine that it is not practicable and feasible to construct any reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated by this act, together with such private donations and subscriptions as may be tendered to the board, then no portion of said appropriation shall be expended except so much as may have been necessary to defray the expenses of such examination and survey as may have been required by this act or ordered by the board.

[Laws 1891, p. 355, § 2.]

3548. Property of state—Disposition of waters.

SEC. 384. The said reservoir or reservoirs when so constructed, and the waters therein when so collected and stored, shall be the property of the state, and until otherwise provided by law

shall be under the charge, management and control of the said board of construction, and the said waters shall under such rules and regulations as the board may prescribe, be sold or leased, and all moneys received from such sale or lease, whether the same be sold along with state or school land or otherwise, shall be turned in to the state treasurer and by him credited to the internal improvement income fund.

[Laws 1891, p. 354, § 6.]

3549. Acquired rights not impaired.

SEC. 385. Nothing in this act shall be construed so as to impair any rights acquired or that may be acquired under or by virtue of the laws of Colorado.

[Laws 1891, p. 356, § 7.]

3550. Penalty for damaging reservoir.

SEC. 386. Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail for a term not exceeding one year or by both such fine and imprisonment.

[Laws 1891, p. 356, § 8.]

3551. Reservoir—Monument creek.

SEC. 387. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of thirty thousand (30,000) dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Monument creek, upon or adjacent to sections fifteen and twenty-two, township eleven, range sixty-seven west, in the county of El Paso, to store the water of floods for the purpose of irrigation and other beneficial uses; *Provided*, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be vested in the state; *And provided, further*, That all citizens of the state shall have equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law.

[Laws 1891, p. 352, § 1.]

3552. Property of state—Disposition of water.

SEC. 388. That the said reservoir and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be disposed of by sale to those desiring the same, the rates per cubic foot per second of time therefor to be fixed by the said board, the payments thereof to be made to said board payable annually in advance on or before May 1st, of each year. The income derived from the sale of such water to be paid into the state treasury and placed to the credit of the internal improvement permanent fund.

[Laws 1891, p. 353, § 6.]

3553. Acquired rights not impaired.

SEC. 389. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under the virtue of the irrigation laws of the state of Colorado.

[Laws 1891, p. 353, § 7.]

3554. Penalty for interfering with or damaging reservoir.

SEC. 390. Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one thousand (1,000) dollars or by imprisonment in the county jail not exceeding one year.

[Laws 1891, p. 354, § 8.]

3555. Reservoir—Chaffee county.

SEC. 391. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement income fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary for the construction of one or more reservoirs, to be used for the conservation, storage and distribution of flood waters (and waters flowing in said creeks) and for the purpose of supplying the deficiency existing at certain seasons of the year, in the supply of water flowing in the Cottonwood creek, Chalk creek, and the South Arkansas river, Chaffee county, Colorado, for the irrigation of lands which are or hereafter can be irrigated by waters taken from said creeks; *Provided*, That no part of said appropriation shall be used for the purchase of land.

[Laws 1891, p. 347, § 1.]

3556. Board of construction—Powers of board.

SEC. 392. The governor, state engineer and chairman of the board of county commissioners shall be and hereby are constituted a board for the purpose of constructing said reservoir or reservoirs, and shall have power if, after the examination and measurements made by the state engineer as hereinafter provided, they shall conclude that two reservoirs could be constructed with the money hereby appropriated, and that they would more efficiently than one subserve the purposes hereby sought to be accomplished, to cause said two reservoirs to be constructed; *Provided*, That the total cost of said two reservoirs shall not exceed the sum of fifteen thousand dollars hereby appropriated; *And, provided, further*, That, if after proper examination and survey, the board shall determine that it is not practicable and feasible to construct any reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated by this act, together with such private donations and subscriptions as may be tendered to the board, or in the opinion of said board the expenditure of the sum herein appropriated in the construction of said reservoir or reservoirs shall not be deemed expedient, and for the best interest of the whole people of the state of Colorado, then no portion of said appropriation shall be expended except so much as may have been necessary to defray the expenses of such examination and survey as may have been required by this act or ordered by the board.

[Laws 1891, p. 347, § 3.]

3557. Property of state—Management—Sale of waters.

SEC. 393. The said reservoir or reservoirs, when so constructed, and the waters therein, when so collected and stored, shall be the property of the state, and all lands on which shall be constructed said reservoir or reservoirs or the works connected therewith, shall first be vested in the state of Colorado, and until otherwise provided by law shall be under the charge, management and control of the said board of construction, and the said waters shall, under such rules and regulations as the board may prescribe, and shall be sold or leased by said board as said board may deem best, and all moneys received from the sale or lease of said water, whether the same shall be sold along with lands belonging to the state, or otherwise, shall be turned into the state treasurer, and by him credited to the internal improvement income fund.

[Laws 1891, p. 349, § 7.]

3558. Acquired rights not impaired.

SEC. 394. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the laws of Colorado.

[Laws 1891, p. 349, § 8.]

3559. Penalty for damaging reservoir.

SEC. 395. Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment.

[Laws 1891, p. 349, § 9.]

3560. Control of Boss lake reservoir.

SEC. 396. The board of county commissioners of Chaffee county shall have charge and control of that certain state reservoir situated in said county and commonly known as the Boss lake reservoir and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the act providing for the construction of said reservoir and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream known as the South Arkansas demands that the waters in said stream should be replenished for the purpose of irrigating the lands under ditches now, or hereafter to be constructed; *Provided*, That said waters shall be distributed by the said water commissioner pro rata without reference to the dates of priorities of water rights and without expense to the consumers thereof; *Provided, further*, That the county of Chaffee assumes and shall be held responsible for any damages resulting from breakage of the dam or water discharges therefrom.

[Laws 1897, p. 119, § 1.]

3561. Land board control ditches and reservoirs.

SEC. 397. Until otherwise authorized by law, the board of land commissioners is hereby directed to regulate the distribution of water from state canals and reservoirs under such rules and regulations as said board shall deem to be for the best interests

of the state. "And to charge and collect rental for the carriage of water therein."

[Laws 1898, p. 404, § 1.]

[Is this section superseded by section 3562?]

[See sections 3506 and 3509.]

3562. County control of reservoirs.

SEC. 398. The board of county commissioners of any county wherein is situated any state reservoir, shall have charge and control of such reservoir and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the act providing for the construction of said reservoir, and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream which such reservoir is intended to reinforce demands that the water in said stream should be replenished for the purpose of irrigating the lands under ditches now or hereafter to be constructed; *Provided*, That said waters shall be distributed by said water commissioner pro rata without reference to priority of water rights and without expense to consumers thereof; *And, provided, also*, That the counties in which said reservoirs are situated assume and shall be held responsible for any damages resulting from breakage of the dams or water discharges therefrom; *And, provided, further*, That the provisions of this act shall not apply to any state reservoir constructed primarily for the purpose of irrigating state lands, but any such reservoir shall remain in the control of the state board of land commissioners.

[Laws 1899, p. 350, § 1.]

Index to Statutes

ADJUDICATION.**Section**

barred after 4 years	3314
copy of decree—certificate of authority to Water Commissioner.....	3325
decree—entered by court.....	3305
numbering ditches, canals and reservoirs.....	3290
evidence by owner or consumer.....	3284
at former hearing may be used.....	3295
fees of clerk of district court	3320
findings by court	3284
date of commencement of construction of ditch.....	3284
diligence in construction	3284
original size and capacity	3284
enlargement—time of	3284
injunctions after adjudication	3313
limitation—4 years	3314
motion, petition	3284
notice of	3286
service of notice	3288
posting notice	3286
proof of publication of notice	3287
publication	3286
to file statement	3286
order for hearing	3284
penalty for failure to secure adjudication.....	3317
proceedings in court	3284
re-argument and review	3318
referee	3291
adjournments	3302
complaint against	3303
compensation of	3300
contempt for disturbing proceedings	3299
court discharge	3306
duties on close of hearing	3304
duties at hearing	3302
evidence before	3298
former evidence—use of	3295
notice by	3292
penalty for not producing evidence before	3297
powers and duties of	3296
proceedings before	3296
proof of posting notice	3293
qualifications of	3291
who may offer evidence	3294
rules made by trial court	3315
sheriff not to serve writ outside of his county.....	3319
statement of claim filed before offering evidence.....	3277
who may apply for adjudication	3277
Id	3284
witness fees in adjudication	3301

ADJUDICATION OF RIGHTS FOR OTHER THAN IRRIGATION

PURPOSES	3280
distribution by water commissioner	3283
numbering of rights	3281
vested rights protected	3282

	Section
AGRICULTURAL COLLEGE LAND—to be included within irrigation Districts. See Irrigation Districts 3494A, 3494G.	
AMOUNT OF WATER TO BE RECEIVED BY CONSUMER.....	3260
ANTI-ROYALTY ACT	3271
APPEALS	3307-3312
bond	3307
costs in Supreme Court	3311
changing point of diversion	3231
dismissal of appeal	3309, 3311
filing in Supreme Court of proof of service.....	3309
order for	3308
rules by Supreme Court	3309
service and publication of order for	3308
statement for	3307
Supreme Court may amend or make new decree	3312
transcript—bill of exceptions	3310
who may make appeal	3307
APPROPRIATION.	
cannot change from domestic to irrigation.....	3178
penalty	3179
right to appropriate water	3165
ASSESSMENTS. See Irrigation Districts.	
for expenses of canals	3458
for payment of bonds of Irrigation Districts.....	3456
collection of	3461
BOARD OF DIRECTORS. See Irrigation District.	
BONDS. See Irrigation District.	
BONUS—ROYALTY—PREMIUM	3271-3275
prohibited	3271
prosecution by attorney general	3274
penalty for exacting	3272
“persons” defined	3275
refusal to deliver water—penalty	3273
BOUNDARIES OF WATER DISTRICTS	3353-3426
BREAKING GATE—BANK, ETC.—PENALTY	3495
BRIDGES—ACROSS HIGHWAYS	3235
CANALS. See Ditches and Canals.	
CERTIFICATE OF PUBLICATION OF NOTICE BY SECRETARY OF STATE	3279
CHANGING APPROPRIATION—DOMESTIC TO IRRIGATION...	3178
CHANGING HEADGATE OF DITCH	3173
CHANGING LOCATION OF DITCH—MAP	3181
CHANGING POINT OF DIVERSION.	
appeals, re-argument, review	3231
consolidation of applications	3228

	Section
decree for—filing	3223
notice of application	3227
one district to another	3230
petition for	3226
CITIES—DITCHES IN—COVERED	3241
CLERK OF DISTRICT COURT—FEES IN ADJUDICATION...	3320
publication of notice by	3286
CORPORATIONS.	
articles of incorporation	988
assessments for maintenance	991
of ditch after stock paid in full	991
compelled to furnish water	992
commence work within 90 days	989
consolidation of ditch companies	995
proceedings to effect	995
damages to property of	994
extension of corporate life	996
proceedings to effect	997
rates of charge for water	992
repair of ditch	993
right of way for ditch	990
time within which to complete construction of ditch.....	989
COUNTY COMMISSIONERS FIXING RATES OF CHARGE FOR WATER.	
adjournment of hearing	3268
contracts—existing—not affected	3263
duty to approve map and statement of reservoir.....	3218
false swearing at hearing before water commissioners—penalty.....	3269
fix date for hearing	3266
grounds for hearing	3266
hearing before	3267
notice of—to owners of ditches	3267
service of	3267
return of service	3267
maximum rate	3265
order by	3268
petition for fixing of rates	3262
notice	3262
service	3262
powers and duties	3263
proceedings before	3263
testimony before	3268
time order in force	3268
COUNTY SURVEYOR.	
compensation of	3220
empty reservoirs if unsafe	3219
file map on completion of reservoir.....	3217
inspect reservoirs	3219
not liable for damages	3221
notice of unsafe condition	3219

	Section
report to county commissioners	3219
select sites for reservoirs	3215
supervise construction of reservoirs	3216
DAMS, APPROVAL OF, BY STATE ENGINEER	3323
DAMAGES.	
to property of corporations	994
from failure to erect headgate	3245
from allowing overflow of water	3204
from lack of providing bridges for ditches.....	3237
from breaking of reservoir embankment	3213
DECREE.	
after findings by referee	3305
by referee	3304
certified copy to State Engineer	3346
certified copy to Division Engineer	3349
entered by court	3305
exceptions to	3305
in change of point of diversion	3229
number ditches and reservoirs	3290
DELIVERY OF WATER—UPON TENDER OF CHARGES.....	3271
penalty for failure to deliver	3273
DITCHES.	
change—enlargement—maps	3181-3183
consolidation of ditch companies	995
crossing highways—bridge	3235
crossing land—one only	3170
diligence in construction	3284
embankments—maintained by owner	3233
enlargement of	3172
extension of headgate up stream	3173
heads of flumes—latticed	3242
penalty for failure	3243
in cities—covered	3241
owners of rights from—duties	3260
refusal of owners to deliver water—penalty.....	3257
repairs of	3255
right of way for carrying seepage or waste.....	3177
water commissioners must deliver water to	3253
DIVERSION—CHANGE OF POINT. See Changing Point of Diversion.	
DOMESTIC USE. Appropriation for cannot be changed to irrigation	3178
DIVISION ENGINEER.	
appeals from regulations of to State Engineer.....	3344
appointment of	3335
application for appointment	3338
call out water commissioners	3344
charges against water commissioners	3345

	Section
control headgates, measuring weirs and flumes.....	3252
data of—open to inspection	3344
decrees—copies of must be furnished to	3346
divisions 4 and 5—jurisdiction of	3336
duties of	3344
examination of	3340
expenses of	3342
meetings of	3347
oath of office—bond	3343
offices—where located	3335
perform duties of water commissioner	3344
prepare rating tables	3250
qualifications of	3339
regulations—power to make	3344
removal of	3341
salaries of	3342
superintendent of irrigation abolished	3335
report of failure to receive water—duty.....	3351
term of office	3341
under supervision of State Engineer	3344
vacancies—examination for	3337
water commissioners—control of	3344
 DRAINAGE DISTRICTS.	
advancement of costs	3494—L
advertisement for bids	3494—Q2
annexation of new acreage	3494—H3
application for exclusion	3494—O
application for inclusion	3494—O
assessment.	
annual audit	3494—M2
annual estimate	3494—K2
book—delivered to district treasurer	3494—O2
complaints against	3494—M2
for interest on bonds	3494—L2
sale and redemption of land for collection of.....	3494—P2
transmitted to assessor	3494—N2
ballots—for election	3494—S
board of directors of district.	
bond of	3494—O1
meetings of	3494—F1
public	3494—G1
quorum	3494—G1
oath of office	3494—N1
powers of	3494—D1, 3494—K1
institute suits	3494—K1
take conveyances	3494—K1
vacancy—how filled	3494—A2
bond of contractor	3494—R2
bond for costs of election	3494—K
advance costs in lieu thereof	3494—L
bonds—additional	3494—X2
bonds of district.	
contents of	3494—V2

	Section
confirmation of	3494—J3
election notice	3494—T2
interest on—annual assessment for	3494—A3
maturing under 20 years	3494—W2
payable in series	3494—U2
interest on	3494—U2
sale of	3494—Y2
sealed bids for	3494—Z2
special election.....	3494—S2
canvass of vote by county commissioners.....	3494—Y
certificate of election	3494—Z
change of boundaries	3494—P
claims—verified—registered	3494—G2
committee to present petition to county commissioners.....	3494—J
condemnation of right of way	3494—E1
confirmation of bonds by court	3494—J3
construction—bids for—notice—publication	3494—Q2
construction of ditches	3494—E1
contractor—give bond	3494—R2
contracts—limitation on	3494—E1
directors not to be interested in—penalty.....	3494—D3
costs of organization—paid in advance.	3494—L
costs advanced—refund	3494—M
county commissioners.	
act as directors—when	3494—R
appoint judges of election	3494—V
change boundaries	3494—P
canvass votes	3494—Y
designate polling places	3494—U
establish precincts	3494—U
fill vacancies in board of directors	3494—F3
Id.	3494—A2
petition for organization	3494—H
directors.	
election of	3494—T
not to be interested in contracts	3494—D3
vacancy—how filled	3494—F3
dissolution of district,	
order for	3494—N3
petition for	3494—M3
division of district	3494—T
election.	
announcement of result	3494—Y1
certificate of	3494—Z1
canvass of returns	3494—Y
count of ballots	3494—V1
judges of	3494—R1
Id.	3494—S1
notice of	3494—Q1
oath of officers	3494—T1
of board of directors	3494—R
Id.	3494—M1

	Section
polls—open and close	3494—U1
tie vote	3494—X1
eminent domain	3494—B3
exemption from taxation	3494—J1
expenses—by whom paid	3494—M
hearing on petition for organization	3494—O
judges of election	3494—V
judicial notice	3494—G3
limitation.	
of organization	3494—B1
for questioning organization	3494—G3
map	3494—J
monthly remittances	3494—D2
new land—annexation of	3494—H3
notice of election.	
contents	3494—S
publication	3494—W
office—where located	3494—P1
officers—when enter upon duties	3494—A1
order	3494—Q
order of organization	3494—Y
order and plat filed with county clerks	3494—Z
organization—when complete	3494—A1
owners of land—organize district	3494—K3
county commissioners approve	3494—L3
petition for organization	3494—H
by whom signed	3494—J
contents of	3494—J
map	3494—J
to county commissioners	3494—H
polling places—designated by county commissioners	3494—U
president—election of	3494—C1
private ownership of drainage districts	3494—K3, 3494—L3
publication of notice of election	3494—W
publication of notice for bids	3494—Q2
publication of petition	3494—N
purchase of ditches	3494—E1
qualifications of voters	3494—X
quo warranto	3494—G3
records of board of directors open to inspection	3494—G1
refund of costs advanced	3494—M
revenue laws—applies as to collection of assessments	3494—P2
right of entry	3494—H1
right of way	3494—B3
over state lands	3494—C3
salaries of directors and secretary	3494—L1
seal	3494—C1
secretary—appointment	3494—C1
secretary of board—salary	3494—L1
special meetings of board of directors	3494—F1
surveys	3494—E1
right of entry to make	3494—H1
taxation—exemption	3494—J1

	Section
title to property in district	3494—J1
treasurer of district	3494—B2
duties	3494—C2
report of	3494—J2
voters—qualification of	3494—X
vouchers—itemized	3494—H2
warrants.	
signed and sealed	3494—E2
interest after presentation	3494—F2
water gathered by drainage,	
ditches—property of district	3494—E3
who may propose organization	3494—H

DRAINAGE DITCHES.

allotment of work for	3195
bond of petitioner for	3190
board of viewers	3191
compensation to viewers and engineers	3199
construction—enlargement—extension	3188
contract for—advertisement—bond	3196
eminent domain	3200
ownership of water from—pro-rated	3201
payment for assessment	3197
petition for	3188
contents of	3189
proceedings in court	3191
report of viewers	3194
testimony before board of viewers	3192
unfavorable report—costs	3193
vouchers for damages, etc.	3198
when not feasible	3193

ELECTIONS. See Irrigation Districts.

EMBANKMENTS OF DITCHES AND CANALS	3233
--	-------------

EMINENT DOMAIN.

for ditches	3167
for Irrigation Districts	3451
for drainage ditches	3200
for reservoirs	3202

ENLARGEMENT OF DITCH OR RESERVOIR—MAP	3181
by other than owner	3172

EVIDENCE.

before county commissioners in fixing rates for water	3262
before referee	3298
before former referee	3295
by owner of ditch	3284
certificate—prima facie	3285
certified copies of maps	3186
claim must be filed before offering evidence	3316
in adjudication	3291

	Section
in former hearing—when may be used	3295
of annexation of adjacent lands to Irrigation District.....	3477
EXCESS WATER.	
running of forbidden	3239
penalty for	3240
EXCESSIVE CHARGE FOR CARRYING WATER.....	3272
EXCHANGE OF WATER	
allowance for seepage and evaporation	3222
between reservoir and ditch	3225
measuring and registering	3223
record by water commissioner	3224
EXTENSION OF HEADGATE UP STREAM	3173
FASTENINGS FOR HEADGATES	3248
FEES.	
collected by State Engineer	3332
of clerk of district court	3334
FINDINGS OF COURT IN ADJUDICATION	3284
FINES. See Reservoirs.	
FLUMES—measuring	3248, 3253
FLUMES—heads of—latticed	3242
GAUGE ROD IN RESERVOIRS	3251, 3253
HEADGATES.	
extension up stream	3173
interfering with headgate after having been adjusted by water commissioner—penalty	3497
locks and fastenings on	3247
owners erect and repair	3248
penalty for not erecting	3245
water commissioner erect headgate and waste-gate when owner refuses	3246
IMPOUNDING OF WATER. See Reservoirs.	
INJUNCTIONS—AFTER ADJUDICATION	3313
INSPECTION OF MEASURING WEIRS OR FLUMES BY CON- SUMERS	3253
INTERFERING WITH DITCH—PENALTY	3495
justice of peace—jurisdiction	3496
IRRIGATION DISTRICTS.	
agricultural college and school lands. petition for inclusion in district	3494—A
form and requirements of petition	3494—B
assessments	3494—C
duties of county treasurer and register of land board....	3494—D
accrued assessments—paid by purchaser	3494—E

	Section
rent	3494—F
requirements of contracts of sales	3494—G
annexation of adjacent lands	3471
best interest of district controls	3475
hearing on	3473
legal representatives—petitioners	3478
majority of owners apply	3471
notice—publication	3472
order for change of boundaries	3476
petition	3471
petitioners advance costs	3472
protest	3475
prorate accrued indebtedness	3474
records—evidence	3477
redivision of district	3479
assessments for payment of bonds	3456
assessments—how made	3458
collection of	3461
board of directors.	
powers and duties	3450
lease or rent water	3450
meetings	3451
bonds—payment	3456
purpose of	3454
sale of	3455
boundaries—change—effect of	3470
canvass of votes for directors	3448
claims—payment of	3463
collection of assessments	3461
construction of canals	3462
conveyances	3453
county commissioners	3459
fix levy	3461
directors—board of.	
election of	3446
canvass of votes	3448
meetings of	3451
bonds of	3445
dissolution of district	3487
Id.	3488
district treasurer	3460
division of districts—directors	3486
elections	3443
of board of directors	3446
officers	3447
eminent domain	3469
exclusion of lands from	3480
order for—effect	3485
petition for	3481
notice of—publication	3482
hearing of	3483
protest	3484
expense of organization	3464

	Section
government land—inclusion in district	3475
judicial examination	3489
petition for	3490
notice—publication	3491
pleading and practice	3492
determination—costs	3493
levy for expense	3457
limit of indebtedness	3467
notice—publication	3443
officers—oath—bond	3445
records—terms of office	3449
petition for organization	3441
presentation and allowance	3442
proclamation—canvass of votes	3444
pro-rating water	3468
re-division of district	3479
repeal and emergency	3494
requirements in general	3442
right of way across—stream, street, railway, etc.....	3465
salaries of officers	3466
title to property—in district	3452
who may organize	3440
 JUDICIAL EXAMINATION.	
in re irrigation districts	3489
in re drainage districts	3494—J3
JURISDICTION OF COURTS—ADJUDICATION.....	3276
LEVY FOR EXPENSE OF IRRIGATION DISTRICTS.....	3457
LEASING WATER	3450
 LIMITATION.	
suits may be brought within 4 years after adjudication.....	3313
suits barred after 4 years	3314
re-argument—review—barred after 2 years.....	3318
 LOANING WATER. See Exchange of Water.	
LOCKS FOR HEADGATES	3248
MANUFACTURING—ADJUDICATION OF WATER FOR	3280
 MAP AND STATEMENT.	
certified copy as evidence	3186
examination by State Engineer	3185
of reservoir sites	3217
of change—enlargement, extension	3183
of construction or enlargement	3181
temporary—enlargement	3183
signing statements	3184
validating former filing	3187
verification of	3184
MEADOWS—IRRIGATION OF	3176
MEASURING WEIRS	3253, 3249, 3329

	Section
MEASURING WATER EXCHANGED	3223
MEASUREMENT—UNIT OF	3330
NOTICE. See Irrigation Districts; Drainage Districts.	
by referee in adjudication	3292
in changing point of diversion	3227
in proceeding to annex adjacent lands to Irrigation District	3472
of proceedings in adjudication	3278, 3287
of proceedings after adjudication	3289
of hearing for fixing rate of charge for water	3267
of exclusion of lands from Irrigation Districts	3482
of judicial examination in re Irrigation Districts	3491
of petition to fix rates of charge for water	3262
of too much water flowing	3261
proof of publication by Secretary of State	3278
publication in adjudication by clerk of district court	3286
service of notice in adjudication	3288
to parties on change of point of diversion	3227
to erect measuring weirs or flumes	3243
NUMBERING OF PRIORITIES OF RIGHT	3281
NUMBERING OF DITCHES	3290
OFFENSES.	
cutting or breaking headgate, bank, or ditch	3495
OFFICERS. See Irrigation Districts; Drainage Districts.	
OWNERS OF DITCHES—DUTIES.	
entitled to use of water	3165
to bridge ditch	3235
to cover ditches in cities and towns	3241
to maintain embankments	3233
to permit others to enlarge	3172
to lattice heads of flumes	3242
to supply water if practicable	3254
to take shortest route across land for ditch	3171
to repair ditches	3255
to erect headgates	3248, 3244
to maintain measuring weirs and flumes	3253, 3249, 3329
to report failure to receive water	3351
to prevent flow of excess water	3239
to take no more water than allowed	3260
refusal to deliver water—penalty	3257
PENALTY	
for failure to erect measuring weirs	3249
for failure to secure adjudication	3317
for failure to erect headgate	3248
for failure to erect measuring weirs or gauge rods	3253
for failure to survey contour lines	3253
for false swearing	3269
for refusal to produce evidence before referee in adjudication	3297
for excessive charge for carrying water	3272

	Section
for refusing to deliver water	3257, 3273
for failure of water commissioner to perform duties	3439
for misapplication of water	3179
for running excess water	3240
for failure to cover or lattice ditches	3243
for interfering with headgate	3497
PLEADING AND PRACTICE See Appeals; Evidence; Decree	
Sec. 3305; Adjudication Sec. 3284.	
exclusion of lands from Irrigation Districts	3481
in fixing rates of charge for water	3262
in changing point of diversion	3226
judicial examination in re Irrigation Districts	3492
POWER PURPOSES—WATER FOR	3280
PREMIUM FOR DELIVERY OF WATER	3271
PRIOR RIGHTS—WATER TO BE DISTRIBUTED IN ACCORD-	
ANCE WITH	3432
PRO-RATING	3175
PROCEEDINGS IN COURT FOR ADJUDICATION	3284
PUBLICATION OF NOTICE BY SECRETARY OF STATE	
after decree of adjudication	3289
in adjudication	3278
Id. by clerk of district court	3286
certificate of	3279
of order for appeal	3308
RATES OF CHARGE FOR WATER. See County Commissioners.	
false swearing at hearing	3269
fixing date of hearing	3266
hearing application	3265
petition	3262
proceedings	3263
postponement of hearing	3268
right to continue to purchase water	3264
service of notice of hearing	3267
RATING TABLES	3250
RE-ARGUMENT IN ADJUDICATION	3318
RECEIVING MORE WATER THAN ENTITLED TO	3239
duty of one so receiving	3240
REFEREE. See Adjudication.	
REGULATIONS BY DIVISION ENGINEER	3344
RENTING WATER	3450
RENT OF SCHOOL LANDS—LESSEE PAY IRRIGATION DIS-	
TRICT ASSESSMENTS	3494—F
RESERVOIRS.	
amount of water impounded	3207
compensation of County Surveyor in re	3220

	Section
contour lines—survey of	3253
conducting water through natural channels	3203
construction of	3216
damages—owners liable	3204
from breakage of reservoirs	3213
duty of county commissioners	3218
embankments—approved by State Engineer	3323
emptied by County Surveyor	3219
expenses of inspection and construction	3206
exchange water with ditches	3225
finer for not complying with orders of State Engineer.....	3323
guage rods	3251
map after commencement of work.....	3181
map and statement after completion	3217
on arid lands—survey of sites	3215
right to water for	3202
selection and survey of sites for	3215
State Engineer examine	3209
appeal from decision of	3212
expense of	3211
may use force	3210
supervise construction	3205
survey sites	3253
supervision of construction	3205
survey	3253
when water not to be stored	3251
RIGHT TO CONTINUE TO PURCHASE WATER	3264
RIGHT OF WAY.	
condemnation of	3169
extent of	3168
for ditches	3170, 3167
for seepage water	3177
for drainage ditches	3494—B3
ROYALTY. See Bonus.	
RULES.	
by Supreme Court	3309
by District Court	3315
SALE OF SCHOOL LANDS INCLUDED WITHIN IRRIGATION DISTRICTS	3494—G
SALARIES. See Irrigation District; Drainage District.	
SCHOOL LAND—to be included within Irrigation Districts..	3494—A
sale of—purchaser pay assessments for Irrigation Districts..	3494—E
SEEPAGE WATER.	
allowance for in loaning water.....	3222
filing on	3177
priority of right to	3177
right of way for ditches for	3177

	Section
SECRETARY OF STATE—PUBLISH NOTICE OF ADJUDICATION	3273
SERVICE.	
of writ by sheriff	3319
of notice in adjudication	3288
of order for appeal	3308
STATE CANALS AND RESERVOIRS	3499-3562
acquired rights not impaired	3543, 3549, 3558
aid in construction	3504
board issue and sell certificates	3516
board of construction—powers	3541, 3547, 3556, 3535
board of control of canal No. 1.....	3505
board construct laterals	3511
cash subscriptions—how used	3519
contract for and lease water rights	3503
certificates received in lieu of money	3512
construction of ditch	3517
convicts returned to penitentiary	3520
contracts for transportation	3521
coal creek reservoir—rights to water	3529
control turned over to land board	3506
control of Boss Lake reservoir	3560
county control of reservoirs	3562
damaging reservoir—misdemeanor	3532
deputy warden in charge of convicts	3523
establish annual charges for use of water	3509
feeders for South Platte and Arkansas	3527
land board control ditches and reservoirs	3561
location	3534
lease of water rights	3525
location of Mesa County ditch	3514
maintenance and repair	3544
manager of ditch—salary	3524
moneys paid to State Treasurer	3538
penalty for damaging reservoir	3559
Id.	3554
Id.	3550
Id.	3545
property of state—management	3557
Id.	3552
Id.	3548
Id.	3542
Id.	3536
Id.	3530
Id.	3528
Id.	3515
plans and specifications	3540
penitentiary commissioners locate	3499
rights and powers given board	3501
rights and powers of board of control	3508
right of way	3518
reservoir—Hardscrabble Creek	3539

	Section
reservoir—Apishapa Creek	3533
reservoir—Saguache Creek	3546
reservoir—Monument Creek	3551
reservoir—Chaffee County	3555
State Engineer locate canal No. 3.....	3526
State Engineer survey and locate	3500
sale and lease of water	3537
shall not impair vested rights	3531
superintendent of construction—salary	3522
State board of control—traveling expenses	3513
title to canal in state	3510
use of water—lease of lands	3507

STATE ENGINEER.

appeals from regulations of Division Engineer.....	3344
appointment of	3321
approve designs for dams and reservoirs	3323
bond of	3321
certified copies of decrees	3346
data of water supply—recorded by	3334—A
deputies—appointment of	3326-3327
salary of	3328
duties of	
as to Water Commissioners	3324
control headgates, weirs, flumes	3252
determine amount of water to be impounded by reservoirs.....	3207
examine maps and statements	3185
examine reservoirs	3209
general control	3322
measurements of streams	3322
measuring weirs—required by	3329
perform all duties imposed upon him.....	3325
prepare rating tables	3250
supervise construction of reservoirs	3205
supervise placing of guage rods	3251
survey reservoir sites	3253
fees.	
application of	3334
collection of	3332
disposition of	3333
record data as to water supply	3334—A
removal of	3321
report to Governor	3331
salary of	3321
term of office	3321

STATE LANDS—LEASE OR SALE—ASSESSMENTS FOR IRRIGATION DISTRICTS 3494—F

STATEMENT OF CLAIM—FILING 3277

SUPREME COURT.

amend or make new decree	3312
make rules for appeals	3309

	Section
SUPERINTENDENT OF DITCH—MEASURE WATER.....	3256
UNIT OF MEASUREMENT	3330
VESTED RIGHTS.	
not to be impaired	3234
protection of	3282
Waste gates—owners of ditches erect	3248, 3246
WASTE OF WATER.	
owners of ditches must prevent	3233
water commissioners prevent	3438
WATER COMMISSIONER.	
appointment of	3427
assistants—compensation	3436
authority of—certificate of adjudication	3285
begin work—when	3430
bond of	3427
charges against	3345
deputies—compensation	3435
duties of,	
controlled by Division Engineer	3344
devote entire time to work	3431
divide water according to priorities	3432
examine ditches	3438
fasten headgates	3432
failure to perform duties	3439
prevent waste	3438
prevent those not entitled from using water	3438
to protect decreed rights	3432
to deliver water	3258
to keep accounts	3437
to keep record of exchange of water	3224
to report to Division Engineer	3314
to erect headgate when owner refuses	3246
locks to headgates	3248
misdemeanor—penalty	3439
number of	3427
oath of office	3429
pay of	3434
powers of	3433
reports of	3350
removal of	3428
vacancies—how filled	3428
WATER SUPPLY—DATA	3334—A
WEIRS—MEASURING	3253, 3249, 3329
WHEELS FOR RAISING WATER	3180

Index to Text

ABANDONMENT.

	Section	Page
after decree	3a 3	30
appropriation of abandoned water	11	33
Id.	56	59
by acquiescence	2	29
burden of proof of	181a	132
cannot be shown on application to change point of diversion	116a	97
changing point of diversion	116b	97
definition of	1	29
Id.	3a	30
Id.	3b	30
elements of	3	30
evidence of	4	32
Id.	178	131.
Id.	181a	132
Id.	181b	133
intention to abandon	3a	30
latitude of trial court	4	32
non-use	3a 3	30
Id.	3a 4	30
Id.	3b	31
Id.	8	33
Id.	178b	132
no intention of returning	3a	30
of completed appropriation	12	34
of construction of canal	9	33
of increased flow	198	140
of ditch is not of water	5	32
of milling priority	6	22
Id.	261	170
of mill-race	7	33
operates instanter	3a 1	30
pleading and practice	209	146
repairs—failure to make is not abandonment	8	33

	Section	Page
resumption of right before re-appropriation	253a	168
reservoirs	253	167
special plea of	209	146
subsequent to decree only	10	33
use of abandoned water	11	33
what can be abandoned	12	34
when complete	13	34
who may raise question of	14	35
ACRES.		
may increase acreage to be irrigated	88c	78
ABANDONED WATER.		
claim to	181b	133
right to cannot be revived	9	33
use of	11	33
ACQUESCENCE. See Pleading and Practice	223a	150
Id.	229	115
in abandonment	2	29
in jurisdiction of court	229a	155
in use of water, buy the U. S.	302	192
in provisions of decree	229	155
ACRES.		
considered in determining amount of water decreed	17	41
ACT OF TERRITORIAL LEGISLATURE.		
protecting priorities	63	63
Id.	302	192
ACTS OF CONGRESS.		
recognizing appropriations	62	62
construed	63	63
ACT OF TERRITORIAL LEGISLATURE.		
recognizing appropriations	63	63
ADDITIONAL APPROPRIATION.		
decree for	16a	40
ADJUDICATION. See Pleading and Practice	212	146
calculation of capacity of canal	15	37
by Kutter's Formula	15b	37
decree. See DECREE.		
determining amount of water	17	41
duty of ditch owners	19	42
evidence used in subsequent hearings	180	132
effect of	20	42
excess rights	16f	40
for domestic use	21	42
for mining use	21	42
for milling use	21	42
jurisdiction of courts	22	43
limitation of actions	23	43
four years	23b	43

INDEX TO TEXT

409

	Section	Page
laches	23e	45
parties affected	23d	44
in different districts	23d 1	44
those not parties	23d 2	44
proceeding after statute has run	23a	43
re-argument or review	23f	45
sale of excess rights	23g	45
two years	23c	44
nature of	24	45
proceeding in rem	24a	45
quieting title	24b	46
sui generis	24c	46
notice of	25	46
of district No. 10	26	47
of part of district	27	47
of tributary	27	47
police power	28	47
adjudication statutes	28a	47
regulation—not destruction	28b	47
referee's findings	29	47
relation back	30	48
rights of consumers	31	49
rights of ditches	20	42
ADVERSE USER. See Prescriptive right.	244	163
of abandoned water	3b 3	31
AFFIDAVITS.		
appeal—bill of exceptions	32	49
AFTER ACQUIRED WATER RIGHTS.		
appurtenance	122d	102
deed of trust	121c	101
mechanics lien	126	105
mortgage of	127a	105
under contract with canal company	93d	83
AMOUNT OF WATER APPROPRIATED.		
limited	65	64
ANNUAL LICENSE TAX.		
payment	289	188
APPEALS.		
affidavits	32	49
bill of exceptions lacking	33	49
from State Supreme Court to U. S. Supreme Court..	34	50
federal question raised in nisi prius court.....	34b	50
grounds for a certificate for appeal	34a	50
limitation	35	51
method of taking	36	51
statutory	36a	51
ex parte	36b	51
time	36c	51
objection to judgment—trial to court	233	158

	Section	Page
parties entitled to	37c	52
those representing ditch	37a	52
consumers	37b	52
prejudicial error—presumption on appeal	38	52
public policy—affect on appeal	39	52
remand for new trial	40	52
referee's findings	29a	47
rehearing and review does not waive right to appeal	41	53
time for filing transcript	42	53
verification of statement for	44	53
APPLICATION FOR WATER.		
to canal company	89	80
APPROPRIATION.		
acts of Congress in re	62	62
act construed	62b	63
recognition of existing rights	62c	63
vested rights	62a	63
act of territorial legislature	63	63
amount appropriated—limited	65	64
beneficial use	66	64
important factor	66a	64
decree—referee's findings	66b	65
excessive diversion is not	66c	65
by holder of option to purchase land	53	58
cannot be effected by use only	47a	56
Canal—use of in making an appropriation	74	68
change of purpose of use	67	65
change of character of use	68	66
constitutional provisions in re	64	63
construed	64a	64
date of priority for reservoirs	258	169
double duty	69	66
enlarged use	70	66
defined	70a	66
in general	70b	66
proof of	70c	67
“first in time first in right”	71	67
for cities and towns	54	58
for domestic use	55	59
priority for	55a	59
for milling purposes	56	59
for fish lake	72	67
for milling purposes	56	59
right to sell appropriation for	56a	60
subsequent appropriation of returned waters	56b	60
for reservoirs	57	61
Id.	253	167
for one filling only	260	170
for speculative purposes	58	61
for use in another state	60	62
Id.	229b	156
from canal—headgate tapping	74	68

	Section	Page
from canon	59	62
from stream and ditches—distinguished	88c	78
headgate tapping canal	74	68
intent to appropriate	75	68
Id.	253a	168
in Colorado for use in New Mexico	229b	156
map and statement act	76	68
on public land	61	62
of artificial waters	45	55
of flood and surplus water	73	67
of waters from mines	46	56
of waters after use by a mill	6	32
Id.	56b	60
of waters from springs	47	56
right to	47a	56
of abandoned water	48	57
Id.	11	33
of seepage, percolating or drainage water	49	57
of surface or waste water at terminus of ditch.....	50	57
of additional flow	51	57
of water from tributaries	52	57
what considered as a tributary	52a	58
place of use	77	69
priority	78	69
how acquired	78a	69
measure of	78b	70
to ditches	78c	70
different—from same ditch	78d	70
ownership of—construed	78c	70
returned waters	79	70
riparian rights distinguished from irrigation.....	80	71
right to water appropriated is freehold estate	81	72
same quantity appropriated for use at different times	82	72
senior appropriators cannot enlarge rights to injury		
of junior appropriators	83	73
tenants-in-common preserving estate	84	73
title to land on which water is used not necessary to		
be in appropriator	85	73
vested right	34a	50
waste waters—appropriation of	87	75
from tunnel	87c	75
return to stream	87d	76
what does not constitute an appropriation	86	74
a mere diversion	86a	74
a grant	86b	74
an enlargement of a ditch	86c	74
use by permission	86d	74
use during high water	86c	74
when effected	71	67
APPROPRIATION—ADDITIONAL.		
cannot open former decree to include	16e	40

APPROPRIATORS.

	Section	Page
right to abandoned milling priority	6	32

APPURTENANCE.

after acquired water right	122d	102
deed silent	124	104
easement may be conveyed as	164	125
easement may be an appurtenance	122b	102
general doctrine of	122a	101
need of water will not make it appurtenant.....	122c	102
right of way	122f	103
stock in ditch company	122e	103
water right is not	308	194

ARIZONA.

decisions and statutes referred to	211	146
--	-----	-----

ARTIFICIAL WATERS.

drainage from mine—appropriation	45	55
--	----	----

ASSESSMENTS ON STOCK.

sale for non-payment. See Pleading and Practice...	223e	152
--	------	-----

ATTORNEYS.

verification of statement for appeal	44	53
--	----	----

BENEFICIAL USE

in abandonment	66	64
excessive diversion is not	3b 3	31
finding by referee	66c	65
most important factor in appropriation	66b	65
need not be stated in decree	66a	64
	66b	65

BILL OF EXCEPTIONS.

lacking on appeal	33	49
-------------------------	----	----

BONUS

payment in advance to canal company	144	114
	92	81

BURDEN OF PROOF. See Evidence.**BY LAWS.**

of canal company	90	80
of mutual ditch company	91	81
forfeiture under	91a	81

CALCULATION.

of capacity of canal	15b	37
Id.	15c	38

CANAL COMPANIES.

application for water to	89	80
bonus for delivery of water by.....	144	114
by-laws—forfeiture under	195	139
by-laws of canal company in re change of place of use	90	80
by-laws of mutual ditch company	91	81
forfeiture under	91a	81
certificate of stock for perpetual right	120	100

	Section	Page
compensation of	92	81
none, for use of water	92	81
charge in advance	92	81
sale of stock for non-payment of assessments—		
notice	92a	81
contract. See CONTRACT.		
form of	93p	85
option	93l	84
parole	93n	85
payment for water in advance	93h	83
priority of use	93i	84
proof of contract	93o	85
reorganization	93j	85
that consumers may forcibly take water	93q	85
to enlarge ditch	93r	86
to use water—cannot be construed to be appropri-		
ation	93s	86
to purchase	93t	86
unrecorded contract—innocent purchaser	93u	86
to convey canal to consumers	93k	84
to deliver water in separate shares	93m	84
capacity of canal—calculation	15a	37
contracts with consumers	93	82
action on	93a	82
cancellation of, as to excess right	93b	82
for use of water on specified lands	93c	82
for right of way	93d	83
forfeiture	93a	82
form of contract	93e	83
interference by county commissioners	93f	83
part of water right must be delivered	93g	83
defined	88	78
quasi-public carriers	88a	78
trustees for consumers	88b	78
nature of	88c	78
duties of	94	87
to sell water	94a	87
to furnish water	94b	87
to repair ditch	94c	87
eminent domain. See EMINENT DOMAIN.		
may impose regulations and limitations	88c	78
oral contract	95	87
rates of charge for water	96	88
reasonable	96a	88
demand for change of rates	96b	88
special contract at the rate fixed	96c	88
maximum amount	96d	88
petition—parties	96e	89
right to purchase water from company.....	97	89
rules of company	98	89
sale of excess rights	100	89
sale of stock for non-payment of assessments	92a	81
stock in—appurtenance	122e	101

	Section	Page
stock in—ownership of	99	89
transfer of interests to a new corporation under contract	101	90
unincorporated canal companies	102	90
CANON.		
appropriation of water from	59	62
CAVEAT EMPTOR.		
sale of excess rights	130	109
CERTIFICATES OF STOCK.		
for perpetual water rights—transfers	120	100
CHANGE.		
from irrigation to storage	255	168
of character of use	145	115
of character and method of use	68	66
Id.	145	115
Id.	255	168
of head of ditch does not effect a forfeiture	197	139
of place of storage. See Reservoirs.....	255	168
of place of use	110	94
Id.	90	80
under a canal company's ditch	90	80
of purpose of use—irrigation to storage	67	65
Id.	83	73
of point of diversion. See Evidence.		
contract to purchase if change allowed	104	92
from one district to another	105	92
injurious effect	106	92
loss by seepage and evaporation	106a	92
to junior appropriator	106e	93
to party complaining	106b	93
rapidity of flow	106c	93
waste water	106d	93
mutual ditch company	107	93
injurious effect	107a	93
by one or more members	107b	94
notice of	108	94
Id.	25a	46
on terms	109	94
pleading injury	111	95
quieting title	112	95
right to	113	95
qualified	113a	95
vested	113b	96
statutes in re	114	96
remedial only	114a	96
requirements must be complied with.....	114b	96
times of scarcity	115	96
what can not be shown on application for.....	116	97
abandonment	116b	97

INDEX TO TEXT

415

	Section	Page
enlarged use	116a	97
what not to be determined	117	97
vested right of junior appropriator	118	98
CHANGED CONDITIONS.		
adaptation of law to	210	146
CITIES.		
taking of water for—compensation	54	59
COLLATERAL ATTACK.		
cannot usurp functions of appeal	15c	38
on decrees	15c	38
Id.	16b	38
See Pleading and Practice	215	147
COMMINGLED WATERS.		
rights in	146	115
COMMUNITY DITCH. See Mutual Ditch Co.; Tenants in Common.		
COLOR OF TITLE.	244	163
CONDITIONAL DECREE.		
for reservoirs	256	169
for no definite amount	16b	38
not void	16b	38
CONDITIONS PRECEDENT.		
rules of canal company	98	89
CONFIRMATION.		
of proceedings in organizing irrigation districts. See Irrigation Districts.		
COVENANT. See Conveyance.		
CONGRESS.		
act of, regarding appropriation	62	62
CONSPIRACY. See Pleading and Practice		
by board of directors of a company.....	234e 127d	159 105
CONSTITUTION.		
of state—in re appropriation	64	63
construed	64	63
protects vested rights	298	191
protects water rights	304	193
CONSUMERS.		
appeal in case of fraud	37b	52
from a ditch—appropriators	88c	78
from ditch or canal—rights of	88c	78
rights of, determined in adjudication.....	31	48

	Section	Page
statutory right to water from ditch	93a	82
Id.	1	29
CONTRACT. See Canal Companies—contract.		
between appropriator and State	34a	50
Id.	76	68
between State and consumer under Map and State-		
ment Statute	76	68
Id.	34	50
by canal company, to convey canal to consumers....	93k	84
canal company with consumer	93	82
forfeiture of rights under	93a	82
for right of way	93d	83
perpetual right to water	93d	83
when an option	93i	84
for water from mines	46	56
for water, may be an easement	163	124
that water be used on specified land—enforceable...	93c	82
to purchase, if change of point of diversion is secured	104	92
CONVEYANCE.		
appurtenance. See Appurtenance.		
by deed of trust	121	100
intention	121a	100
on shares of stock	121b	101
on after acquired water rights	121c	101
statute of limitation	121d	101
redemption	121e	101
covenant	123	103
imposing burden on land	123c	104
of warranty	123b	104
“together with water sufficient to irrigate said		
land”	123a	103
description of water right in deed controls	124	104
deed silent as to water right	125	104
intention governs	125a	105
mechanics' liens	126	105
mortgage	127	105
See Mortgage.		
mutual ditch company	128	107
conveyance of stock conveys water	128a	107
conveyance of part of water right	128b	108
notice of easement	129	108
notice of sale of excess rights	130	109
notice to purchaser	131	109
of abandoned water	9	33
of an interest in a ditch	156	122
of part of water right	128b	108
of water may be made separate from land.....	119	100
Id.	122a	101
of right to water by delivery of certificate	120	100
of an easement as an appurtenance	164	125
of water appropriated for mill-race	56a	60
oral contract to convey water	132	109

INDEX TO TEXT

417

	Section	Page
riparian owner	133	110
secret unrecorded contracts	93u	86
unpaid assessments	134	110
CORPORATION.		
sale of stock for non-payment of assessments.....	223e	152
COUNTY COMMISSIONERS.		
fix rates of charge for water	96	88
fix maximum rate only	96d	88
COVENANT. See CONVEYANCE.		
CRIMINAL LAW		
contempt	216	148
information—refusal to deliver water	217	148
DAMAGES.		
complaint in action for	135	111
in condemnation proceedings	136	111
Id.	175	129
instructions in action for	137	111
measure of	138	112
mortgage	139	112
from overflowing ditch	140	112
permanent improvements	141	113
to growing crops	142	113
trespass	143	113
reservoirs—liability for. See Reservoirs.....	257	169
DECLARATIONS.		
evidence of intention to abandon	184	134
DECREE. See Res Adjudicata.		
appeals from	16a	38
attacked—perfecting contingent or inchoate rights..	16k	41
before limitation has run—prima facie evidence....	16c	39
cannot be opened for additional appropriation.....	16e	40
conditional		
all elements should be withheld	16b	38
fix date of priority	16b	38
not fix definite amount of water	16b	38
conditional and final—construed together	16b	38
controls in distribution of water	147	115
Id.	153	109
determining amount of water—acres considered	17	41
determines rights between ditches	16c	39
Id.	20	42
distribution under	18	41
evidence of right	16c	39
effect of	16c	39
erroneous—not void	16b	38
failure to number ditch—irregularity only	16d	39
for an additional appropriation	16e	40
for reservoirs. See Reservoirs.....	253	167

	Section	Page
for uncompleted ditch	16b	28
in re obstructions in stream	16l	41
need not state a finding of beneficial use	66b	65
numbering ditches	16d	39
prima facie evidence	16c	39
res adjudicata	10	33
res adjudicata as to calculation	15a	37
Id.	266	172
review and re-hearing	272	176
stranger setting aside	240	162
vold—setting aside—parties	16i	40
what is decreed	16j	40
Id.	20	42
when may be attacked	16k	32
DEED. See Conveyance.		
description of water right in—controls	124	104
silent as to water—presumption	125	105
intention	125a	105
DEED OF TRUST.		
conveyance of water by—intention	121a	100
on shares of stock—"all other stock" not sufficient..	121b	101
on after acquired water rights	121c	101
redemption	121e	101
statute of limitation	121d	101
DISAPPEARING WATERS.		
presumption in re	284d	184
DISTRIBUTION. See State Officers	278	178
bonus	144	114
change of character of use or place of diversion....	145	115
commingled waters	146	115
decree controls	147	115
Id.	18	41
extension of ditch	148	116
in accordance with decrees	18	41
Id.	147	115
loan of water	149	116
loss of water by evaporation and percolation. See		
Subterranean Waters	284	183
method of carrying water	150	117
parties to suit in re	152c	119
pollution of stream	151	117
by alkali	157a	117
by licensee	151b	118
supreme courts original jurisdiction in re.....	151c	118
pro-rating. See Pro-Rating	152	118
State officers—duties	153	119
waste—prohibited	154	120
DISTRICT COURT.		
jurisdiction in adjudication	22	43

INDEX TO TEXT

419

	Section	Page
DISTRICTS—IRRIGATION. See Irrigation Districts..	201	141
Id.	208	143
DITCH.		
abandonment of	5	32
enlargement and use by others	155	121
Id.	86c	74
Id.	309	194
estimated capacity of	158	122
exemption from taxation. See Taxation.....	288	187
more than one water right in. See Water Rights..	307	194
interest therein—how transferred	156	122
intercepting natural flow. See Subterranean Waters	284e	185
parallel—withdrawing of water by percolation. See		
Subterranean Waters	284g	185
stream abandoning its former course.....	159	122
uncompleted—decree	16b	38
DITCH COMPANY. See Canal Companies.		
defined	88	78
DITCH OWNERS.		
duty to appear in adjudication	19	42
DIVERSION.		
by percolation	284b	184
change of point.		
See Change	103	91
DIVIDE.		
conveying water across	160	123
DIVISION.		
distribution in accordance with decrees in all districts		
of	147	115
DIVISION ENGINEER. See State Officers	278	178
distributing water	153	119
DOMESTIC USE.		
adjudication	21	42
defined	55	59
priority for	55a	59
does not attach to canal	55a	59
DOUBLE DUTY	69	66
DOUBLE FILLING		
of reservoirs	260	170
DRAINAGE OF MINE.		
appropriation of drainage water	45	55
DUE DILIGENCE.		
under conditional decree	16b	38
DUTIES OF CANAL COMPANY	94	87

EASEMENT.

	Section	Page
abandonment of	3b 5	32
across an easement	162	124
an appurtenance	122b	102
contract	163	124
conveyance of	164	125
created by enlargement of ditch	93r	96
created by contract	165	125
equity jurisdiction in actions to protect	166	125
evidence of	185	135
notice to purchaser	167	125
perpetual right—an easement	168	126
Id.	3b 5	32
possession in re easement	169	126
prescription	170	126
protection of—equity	222a	149
right of way	171	127
specific performance of contract for	172	127
title to revert	173	127
when acquired	174	128

EMINENT DOMAIN.

canal company may exercise	88c	78
damages	175	129
Id.	136	111
for private use	176	129
what to be and not to be determined in condemnation	177	130

ENLARGED USE.

cannot be made by senior to detriment of junior ap- propriator	70b	66
cannot be shown on application to change point of diversion	116a	97
defined	70a	66
in general	70b	66
proof of	70c	67

ENLARGEMENT OF DITCH.

perpetual right—easement	93r	86
when does not constitute an appropriation	86c	74

EQUITY. See Pleading and Practice	222	149
--	-----	-----

ESTIMATED CAPACITY.

what is	158	122
---------------	-----	-----

ESTOPPEL 223 150

acquiescence	223a	150
as to sale of excess rights	223b	151
by conduct or contract	223c	151
by receiving water under a decree	223d	151
corporation	223e	152
in acquiring appropriation	127a	105
pleading	223g	152
what necessary to establish	223h	152

EVAPORATION.

	Section	Page
loss of water by	283a	183
on change of point of diversion	106a	92
Id.	182b	134

EVIDENCE.

abandonment	178	132
See ABANDONMENT	3	31
Id.	4	32
admission—in complaint in former suit	179	132
adjudication	180	132
burden of proof. See Presumption	181	132
augmenting flow	181d	133
of abandonment	181a	132
of part of water right	181c	133
right under abandonment	181b	133
tributary	181e	133
water from does not reach main stream	52	57
volume not diminished	181f	134
change of point of diversion	182	134
data of water commissioner	183	134
decree is prima facie—before statute of limitations has run	16b	39
declarations—intention	184	134
easement	185	135
examination of on appeal	233	158
in action for pro-rating	152d	119
judicial notice of statutes on adjudication	228	155
none—general denial of answer—dismissal	220	149
non-user—evidence of intention to abandon	3b 2	33
objections to	189	136
of abandonment	3b 2	33
Id.	4	33
of decree	190	136
of main point in issue	188	135
of quantity of water flowing in stream	192	136
of title	193	137
of voluminous documents	194	137
oral	194a	137
best—secondary	194b	138
of enlarged use	70c	67
proof of water right. See Water Right	308	194
proof of title to water. See Title	292	189
proof of ownership of land by signers of petition to organize irrigation district. See Irrigation Districts	208	143
written instrument	191	136

EXCESS WATER.

decree for	16f	40
mutual ditch—sale or lease of	128b	108

EXCESSIVE DIVERSION.

not to beneficial use	66c	65
-----------------------------	-----	----

EXCESSIVE QUANTITY.

	Section	Page
decree for	16f	40

EXCESS RIGHTS.

actions to cancel—limitation—statute of.....	23e	45
Id.	23g	45
estoppel	223b	151
sale of—cancellation	93b	82
cannot bind new company	100	89
parties to suit	234f	159
effect on new company	100	89
pleading. See Pleading and Practice.....	223b	151

EXEMPTION. See Taxation	288	187
--------------------------------------	-----	-----

EXTENSION OF DITCH.

priorities	148	116
------------------	-----	-----

"FIRST IN TIME, FIRST IN RIGHT"	71	67
--	----	----

FISH LAKE.

no appropriation for	72	67
----------------------------	----	----

FLOOD WATERS

appropriation of	73	67
------------------------	----	----

FORFEITURE.

appropriation by another	253a	168
by change of the head of a ditch	197	139
by mutual ditch company	91a	81
of right to water—non-payment of carriage charge..	195	139
of reservoir sites	195	139
of reservoir sites—jurisdiction of state courts.....	263b	171
of consumers' rights under contract with canal com- pany	93a	82
resumption before re-appropriation	253a	168

FORMULA.

for calculation of capacity of canal	15	37
--	----	----

FRAUD.

setting aside decree therefor	224	153
-------------------------------------	-----	-----

FREEHOLD ESTATE.

right to water is	81	72
-------------------------	----	----

GROWING CROPS.

damages to	142	113
------------------	-----	-----

GRANT.

right to water not acquired by	306	193
--------------------------------------	-----	-----

HEADGATE.

may be in a canal instead of in a stream.....	74	68
sufficient water at headgate to satisfy appropriation	79	70

HIGH WATER.

use of water from a ditch during times of high water does not establish a priority	86e	74
---	-----	----

	Section	Page
IMPAIRMENT OF OBLIGATION OF CONTRACT....	34a	50
INCREASED FLOW.		
may be taken out of stream	198	140
use of	11	33
what is	199	140
what is not	200	140
INJURIOUS EFFECT.		
from change of point of diversion. See Change.....	106	92
in distributing water	149a	116
loan of water	149b	117
mutual ditch company	107a	93
INJUNCTION. See Pleading and Practice	225	153
Id.	234e	159
INSTALLMENTS.		
payment for water in	134	110
INSTRUCTIONS.		
in action for damages	137	111
INTENTION.		
deed silent	125a	104
element of abandonment	3a	30
essence of abandonment	3a 5	31
evidence	181c	133
to abandon	3a 4	30
declarations, evidence of	184	134
to appropriate water	75	68
to convey an easement	164	125
Id.	122a	101
Id.	122b	102
to convey water by deed of trust	121a	100
INTERVENTION. See Pleading and Practice	226	154
IRRIGATION.		
appropriation for cannot be changed to storage.....	69	66
water for immediate irrigation distinguished from		
water for reservoirs	259	170
water for irrigation taken for domestic purposes....	294	190
IRRIGATION COMPANY AND STORAGE COMPANY.		
rights of	83	73
IRRIGATION DISTRICTS.		
admission of land into	201	141
boundaries of district determined by board.....	202	141
confirmation of proceedings by court	203	141
constitutionality of act	204	142
division of district during pendency of adjudication.	205	142
exclusion of lands from	206	142
notice of forming	207	142
signing	207a	142
to whom given	207b	143
proof of ownership of land	208	143

JOINT USE.

	Section	Page
of ditch—contract for—oral	93n	85

JUDGE.

disqualification of	227	155
---------------------------	-----	-----

JUDGMENT.

conclusiveness, in condemnation proceedings.....	136	111
without jurisdiction of person	229c	156

JUDICIAL NOTICE.

of statutes on adjudication	228	155
-----------------------------------	-----	-----

JURISDICTION. See Pleading and Practice	229	155
--	-----	-----

KUTTER'S FORMULA	15b	37
-------------------------------	-----	----

LACHES. See Pleading and Practice	230	157
--	-----	-----

in perfecting an appropriation	16k	41
not limitations	23e	45

LAND.

title to not necessarily in appropriator	85	73
amount irrigated considered	17	41
amount irrigated may be increased	88c	78

LESSEE.

may acquire and own water right	305	193
---------------------------------------	-----	-----

LIMITATIONS. See RES ADJUDICATA	265	172
--	-----	-----

Id.	270	174
for rehearing and review of decree	271	176
four years	23b	43
of amount of water appropriated	65	64
of actions for adjudication	23	43
on appeals	35	51
parties affected	23d	44
in different districts	23d	44
those not parties to decree	23d	44
laches	23e	45
re-argument	23f	45
sale of excess rights	23g	45
statute of—in re action to cancel excess rights.....	23g	45
statute of—not defeated by plea of trespass	23e	45
two years—party bound, although he offers no evidence	23c	44

LOAN OF WATER.

injurious effect	149a	116
party to defend rights	149b	117
statutes in re	149c	117
when loan of water can not be made.....	149d	117

MANDAMUS. See Pleading and Practice	232	157
--	-----	-----

MAP—RESERVOIR SITES.

filing with Secretary of Interior	263a	171
---	------	-----

MAP AND STATEMENT ACT.

	Section	Page
date of priority fixed in statement not binding.....	76a	69
does not affect doctrine of relation back	30	39
effect of acts taken, under contract with state	76	68
unconstitutional	76	68

MEASURE OF APPROPRIATION.

by quantity and time	82	72
----------------------------	----	----

MECHANIC'S LIEN.

on after acquired water right	126	105
-------------------------------------	-----	-----

MILLING PRIORITY.

abandonment of	6	32
Id.	7	33
Id.	11	33

MILLING PURPOSES.

appropriation for	56	59
entitled to appropriation, when flow sufficient	56	59
returned water—appropriation for reservoirs	262	170
returned water—appropriation for irrigation	56b	60
sale of appropriation	56	59

MINES.

water from—appropriation of	45	55
Id.	46	56
Id.	51	57
Id.	87c	75

MORTGAGE 127 105

conspiracy by directors	127d	107
Id.	234e	159
foreclosure of—injunction	234e	159
of after-acquired water right	127a	105
release of	127b	107
statements in application for loan	127c	107

MORTGAGEE.

damages to growing crops	139	112
Id.	142	113

MUTUAL DITCH COMPANY. See Tenants-in-Common

by-laws of	91	81
forfeiture under	91a	81
change of point of diversion	91a	81
change of point of diversion by one of the members		
—restrictions	107a	93
conveyance of stock conveys water	128a	107
conveyance of part of water right.....	128b	108

NEW MEXICO.

statutes and decisions of—compared with Colorado.	211	146
---	-----	-----

NEW RULES.

by canal company	98	89
------------------------	----	----

NEW TRIAL.

	Section	Page
after appeal—findings on former trial not res adjudicated	41	53
NON-USE. See Abandonment	3b	31

NOTICE.

of application to change point of diversion	108	94
of adjudication—publication of	25	46
of change of point of diversion	25a	46
Id.	108	94
of easement, to purchaser	167	125
Id.	129	108
of forming of Irrigation District	207	142
of sale of excess rights—to purchaser	130	109
Id.	131	109
of sale of stock in company for non-payment of assessments	92a	81

NUMBERING DITCHES.

failure—irregularity only	16d	39
---------------------------------	-----	----

NUISANCE.

damages for	143	113
-------------------	-----	-----

OBLIGATION.

of contract—impairment of—between state and appropriator	34	50
Id.	76	68

OBSTRUCTIONS IN STREAM	161	41
------------------------------	-----	----

ONE FILLING.

appropriation for reservoirs	260	170
------------------------------------	-----	-----

OPTION.

contract with ditch company	931	84
to purchase land—holder of may appropriate water..	53	58

ORAL CONTRACT.

to convey water	132	109
to furnish water perpetually	95	87

OVERFLOWING DITCH.

damages from	140	112
Id.	153	122

OWNERSHIP.

of land not necessarily in appropriator	85	73
---	----	----

PAROL CONTRACT.

for joint use of a ditch enforceable	93n	85
to convey water	132	109

PAROL GIFT.

action to quiet title to. See Quieting Title	250	165
--	-----	-----

PARTIES. See Pleading and Practice.

to adjudication—relief to one not a party	222d	150
---	------	-----

	Section	Page
to petition to county commissioners to fix rates....	96e	89
Id.	96c	88
representing a ditch—meaning of	37a	52
PART PERFORMANCE.		
oral contract to convey water	132	109
PAYMENT.		
for water in advance	93h	83
Id.	92	81
PERCOLATING WATERS. See Subterranean Waters	285	186
augmenting flow	181d	133
PERPETUAL RIGHT.		
an easement	3b 5	32
Id.	163	126
contract for—extent of	93d	83
oral contract for	95	87
PLACE OF USE.		
change of	77	69
PLEADING AND PRACTICE.		
abandonment	209	146
action on contracts between canal company and consumer	93a	82
adaptation of laws to changed conditions	210	146
adjudication—allegation of—prima facie evidence...	212	146
allegations—legal conclusions	213	146
amount of water in adjudication	214	147
appeal—time for filing transcript	43	53
ex parte application for appeal	36b	51
as to conveyance of water right	122a	101
Arizona and New Mexico decisions	211	146
burden of proof—that water from a tributary reaches main stream	52	57
change of venue	241	162
change of point of diversion—junior vs. senior appropriator	111	95
collateral attack	215	147
complaint in action for damages	135	111
conditional decree—collateral attack	16b 2	33
criminal law—contempt	216	148
Id.	218	148
Id.	279	180
cross-bill	213	148
damages—measure of—destruction of ditch	138a	112
equity	222	149
in actions to protect an easement	166	125
jurisdiction—easements	222c	149
jury—advisory	222b	150
relief to one not a party to an adjudication.....	222d	150
sufficiency of pleading	222c	149
estoppel. See Estoppel.....	223	150
form of plea	223g	152

	Section	Page
evidence—none—dismissal	220	149
findings of referee in adjudication	29	47
fraud	224	153
injunction	225	153
complaint	225a	153
canal company vs. consumer	225a 1	153
consumer vs. canal company	225a 2	153
senior vs. junior appropriator	225a 3	153
defense	225b	154
for interference	225c	154
instructions in action for damages	137	111
intervention	226	154
questions raised by	226a	154
sufficiency of pleading in	226b	154
who may intervene	226c	154
when not necessary to intervene	226d	155
judge—disqualification	227	155
Id.	221	149
Id.	136	111
judgment—conclusiveness of	221	149
Id.	136	111
judicial notice of statutes on adjudication.....	228	155
jurisdiction	229	156
acquiescence	229a	156
appropriation in Colorado, for use in New Mexico	229b	156
effect of judgment without jurisdiction of person.	229c	156
in adjudication—District Court	22	43
Id.	215	147
stream flowing in two counties	22	43
in re forfeiture of reservoirs	263b	171
in re organization of new company	101	90
of district court	229d	156
lashes	230	157
legal conclusions	213	146
mandamus	232	157
affidavit in	232a	157
alternative writ of	232b	157
commanding that which is impossible to be done.. ..	232c	157
parties. See Parties	234	158
canal company	234a	158
consumers—in adjudication	234b	158
defect of	234c	158
grantors	234d	159
in injunction	234e	159
to restrain foreclosure of mortgage	234e	159
to restrain interference with priority	235e 2	159
in re sale of excess rights	234f	159
necessary	234h	160
res adjudicata	269	174
review and rehearing	276	177
state officers	234i	160
to action to quiet title	249	165
to defend rights in re loan of water	149b	165

	Section	Page
petition for review and rehearing	272	176
prejudicial error—presumption on appeal	38	52
prescriptive right	235	161
Id.	243	163
proof.		
change of point of diversion	106b	93
Id.	106a	92
in re, pro-rating	152d	119
quieting title—complaint	247	164
receivers—indebtedness	239	162
replication—aiding complaint	236	161
res adjudicata—evidence	267	174
review and rehearing	273	177
setting aside void decree	161	40
setting aside decree—stranger	240	162
variance—amendment	238	161
Id.	238a	161
POINT OF DIVERSION.		
change of. See Change.		
defined	103	92
POLICE POWER.		
adjudication statutes are an exercise of	28	47
regulation not destruction	28b	47
POLLUTION OF STREAM. See Distribution.		
PREJUDICIAL ERROR.		
presumption on appeal	38	52
PREScription.		
adverse user	245	163
Id.	244	163
obtaining an easement by	170	126
of water from reservoirs	244	163
paper title	245	163
plea of	235	161
presupposes a grant	156	122
water from reservoirs	243	163
PRESUMPTION.		
deed silent	125	104
future payments on water right	134	110
of abandonment—non-use	3b 2	81
of error on appeal	38	52
that the waters of a tributary reach the main stream	52	57
PRIOR PURCHASER.		
right to continue to purchase	94b	87
PRIORITY.		
beneficial use—finding of	66b	65
date of, for reservoirs.....	258	169
date of, for uncompleted ditch	16b	38
different, from same ditch	78d	70

	Section	Page
how acquired	78a	69
measure of	78b	70
of appropriation for reservoirs	253	167
ownership of	78f	70
protection of—injunction	234e	159
to ditches	78c	70
PROPERTY RIGHT.		
water right is	81	72
Id.	304	193
PRO-RATING	152	118
among consumers from same ditch	152a	118
parties to suit in re	152c	119
proof in re	152d	119
preponderance	152d	119
what is	152d	119
PUBLICATION.		
of notice of adjudication—effect of	25	46
PUBLIC CARRIERS.		
quasi—canal companies are	88	78
PUBLIC LANDS.		
appropriation of water on	61	62
PUBLIC POLICY.		
considered on appeal	39	52
QUIETING TITLE.		
adjudication analogous	24b	46
change of point of diversion	246	164
Id.	112	95
complaint in action for	247	164
jurisdiction—equity	248	164
parties	249	165
State officers	249	165
administrator	249	165
to a parol gift	250	165
to a perpetual water right	251	165
to a water right	252	165
RATES.		
of charge for water	96	88
county commissioners fix	96	88
reasonable	96a	88
demand for change of rates	96b	88
special contract at rate fixed	96c	88
maximum amount	96d	88
petition for—parties	96e	89
RE-ARGUMENT—REVIEW. See Review and Rehear- ing.		
RECEIVERS.		
indebtedness of—payment	239	162

REFERREES FINDINGS.

	Section	Page
beneficial use	66b	65
change by court	29b	47
effect on appeal	29	47

RELATION BACK.

doctrine of not affected by map and statement act..	30	48
---	----	----

REORGANIZATION.

of canal company	93j	84
------------------------	-----	----

REPAIRS.

failure to make repairs, not abandonment.....	8	33
making of will not give title	156	122

RES ADJUDICATA.

adjudication	20	42
Id.	22	43
applicable to what	265	172
capacity of ditch	15c	38
Id.	15a	37
decree in adjudication	10	33
Id.	15a	37
Id.	266	172
evidence of	267	174
identity of parties	268	174
when applicable	270	174

RESERVOIRS.

appropriation for	253	167
intention	253a	168
built by state	254	168
change of place of storage	255	168
from irrigation to storage	255a	169
conditional decree for	256	169
damages—liability for	257	169
date of priority	258	169
distinguished from water for immediate irrigation...	259	170
one filling only	260	170
reservoir sites	263	171
filling map	263a	171
forfeiture	263b	171
use of returned water for reservoirs.....	261	170
when water may be stored	262	170
undeveloped reservoirs	264	171

RESUMPTION.

of forfeited right before interference by others....	253a	168
--	------	-----

RETROACTIVE.

constitution in re appropriation is not	64	63
---	----	----

RETROSPECTIVE.

constitution in re appropriation is not	64	64
---	----	----

RETURNED WATER.

	Section	Page
after being abandoned	6	32
from mill-race	11	33
sufficient to satisfy appropriation	79	70
used by reservoirs	261	170

REVIEW AND REHEARING.

application for within two years	16g	40
Id.	23f	45
does not waive right to appeal	41	53
good cause must be shown for	276	177
objections and exceptions	277	177
petition for	271	176
proceeding	272	176
parties	273	177
strangers	274	177
to ditches	275	177

RIGHT OF WAY.

appurtenant to right to water	122f	103
contract for perpetual right	93d	83
easement	171	127

RIGHTS OF CONSUMERS.

determined in adjudication?	31	48
from ditch	88c	78

RIPARIAN OWNER.

cannot convey water separate from land.....	133	110
---	-----	-----

RIPARIAN RIGHTS.

distinguished from constitutional and statutory rights	80	71
--	----	----

ROYALTY	144	114
---------------	-----	-----

RULES OF COMPANY.

condition precedent	98	89
---------------------------	----	----

SALE.

of appropriation for mill-race	56a	60
of excess rights	100	89
of priority right	68	66
of stock for non-payment of assessments	92a	81
of water separate from land	119	100

SEEPAGE WATERS.

appropriation of	285	186
loss of, in change of point of diversion	106a	92
Id.	111	95

SPRINGS.

appropriation of water from	47	56
water from, belongs to owners of land	47a	56

SPECULATIVE PURPOSES.

appropriation for	58	61
-------------------------	----	----

	Section	Page
STATE ENGINEER. See State Officers	278	178
interfering with vested rights	303	192
STATEMENTS.		
filed with State Engineer	76a	69
STATE RESERVOIRS. See Reservoirs	254	168
STATE OFFICERS. See Canal Companies; Distribu-		
tion, Pleading and Practice	234i	160
vested rights	303	192
duties of in distributing water	278	178
Id.	153	118
interfering with vested rights. See Vested Rights..	303	192
parties to action	234i	160
parties to action to quiet title	249	165
Superintendent of Irrigation	281	181
authority—nature of	281a	181
action for fees	281b	181
compensation of	281c	181
Water Commissioner	280	180
closing headgate of ditch	280a	180
compensation of	280b	180
loaning water	280c	180
powers	280d	180
STATUTE OF FRAUDS.		
oral contract for joint use of ditch.....	93n	85
oral contract to furnish water perpetually—not		
within	95	87
oral contract to convey water	132	109
part performance	132	109
STOCK.		
in ditch company—appurtenance	122e	103
in canal company—ownership of distinguished from		
ownership of priority	99	89
sale for non-payment of assessment—purchase by		
company	223e	152
STORAGE.		
change of purpose of use	67	65
change of place	255a	168
STORAGE COMPANY AND IRRIGATION COMPANY.		
rights of	83	73
SUB-IRRIGATION.		
loss of, on change of point of diversion.....	106a	92
SUBTERRANEAN WATERS.		
flowing from tributaries	52	57
flowing from springs—appropriation of.....	47	56
how considered and governed	282	182
loss of water.		
by evaporation	283a	183
by percolation	283b	183

	Section	Page
percolating waters	284	183
California rule	284a	183
diversion of	284b	183
ownership of	284c	184
presumption in re disappearing waters	284d	184
part of stream	284e	185
what is not	284f	185
withdrawal of waters from stream by percolation..	284g	185
seepage waters	285	186
well near stream	286	186
SURFACE WATER.		
appropriation of	87a	75
SURPLUS WATER.		
appropriation of	73	67
Id.	83	73
from terminus of ditch—appropriation of	87b	75
return to stream—appropriation of	87d	76
TAXATION.		
cities purchasing land for the water—exemption....	287	187
ditches—exemption	288	187
TENANTS-IN-COMMON. See Canal Companies.....	91	81
See Conveyance	128	107
of water rights—preserving estate	84	73
TERRITORIAL LEGISLATURE.		
act of—regarding appropriation	63	63
TITLE.		
evidence of	193	137
to water—how proven	290	189
to water unappropriated	291	189
to water appropriated	292	189
TRANSCRIPT ON APPEAL.		
certification of	43	53
time for filing	42	53
TRENCHES.		
intercepting natural flow	284e	185
TRESPASS.		
damages for	143	113
plea of, does not affect limitation	23e	45
TRIBUTARY.		
adjudication of	27	47
appropriation from, to injury of those above confluence	52	57
evidence that source of supply is not a tributary....	181e	133
what is	52a	58
TRUSTEE.		
canal companies are trustees for their stockholders..	88b	78

TUNNEL.

	Section	Page
appropriation of water from	51	57
Id.	45	55
Id.	46	56
increase of flow	198	140
water from—right to	87c	75

UNINCORPORATED.

canal company	102	90
---------------------	-----	----

USE.

by permission does not constitute appropriation.....	86d	74
Id.	156	122
change of purpose	67	65
change of character and method of	68	66
during high water does not constitute appropriation.	86e	74

VARIANCE. See Pleading and Practice	238	161
--	-----	-----

VENUE.

change of	241	162
-----------------	-----	-----

VESTED RIGHTS. See Adjudication	23d	44
--	-----	----

see Appeals	34a	50
accruing prior to adoption of constitution.....	298	190
antedating constitution	294	190
antedating legislation	295	191
definition of	299	191
"first in time first in right"	71	67
junior vs. senior appropriator	300	192
neither court nor legislature can destroy.....	34a	50
protected by constitution	298	191
prior to statutes	301	192
recognized by congress	62a	62
recognized by first legislature	63	63
Id.	302	192
State Engineer interfering with	303	192
to change point of diversion	113b	96
Id.	118	98
under a decree	16k	41

VOID DECREE—SETTING ASIDE.	161	40
---	-----	----

VOLUMINOUS DOCUMENTS.

evidence of	194	137
oral	194a	137

WAIVER.

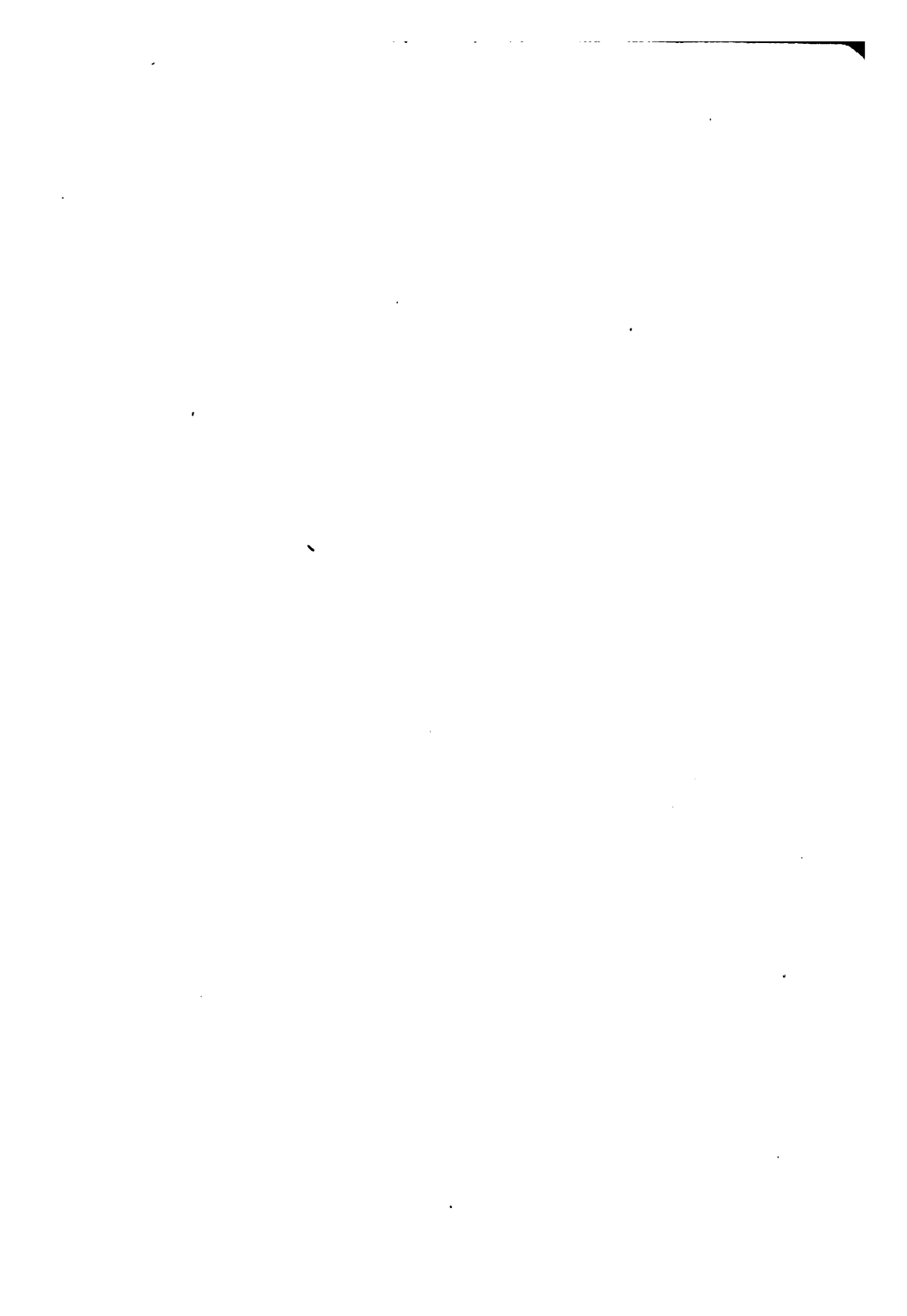
of priority by acquiescence	2	29
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WASTE WATER.

appropriation of	87	75
excess water flowing on surface of land.....	87a	75
from ditch	87b	75
from mine	45	55
from tunnel	87c	75

loss of on change of point of diversion.....	106d	93
return to stream	87d	76
tributary	52a	53
WASTE OF WATER.		
prohibited	154	120
WATER COMMISSIONER. See State Officers.		
WATER RIGHT.		
a property right	81	72
Id.	304	193
lessee may acquire	305	193
not a grant	306	193
more than one in same ditch	307	194
proof of	308	194
WELL.		
near stream	286	186
WYOMING.		
statutes and proceedings discussed	242	162



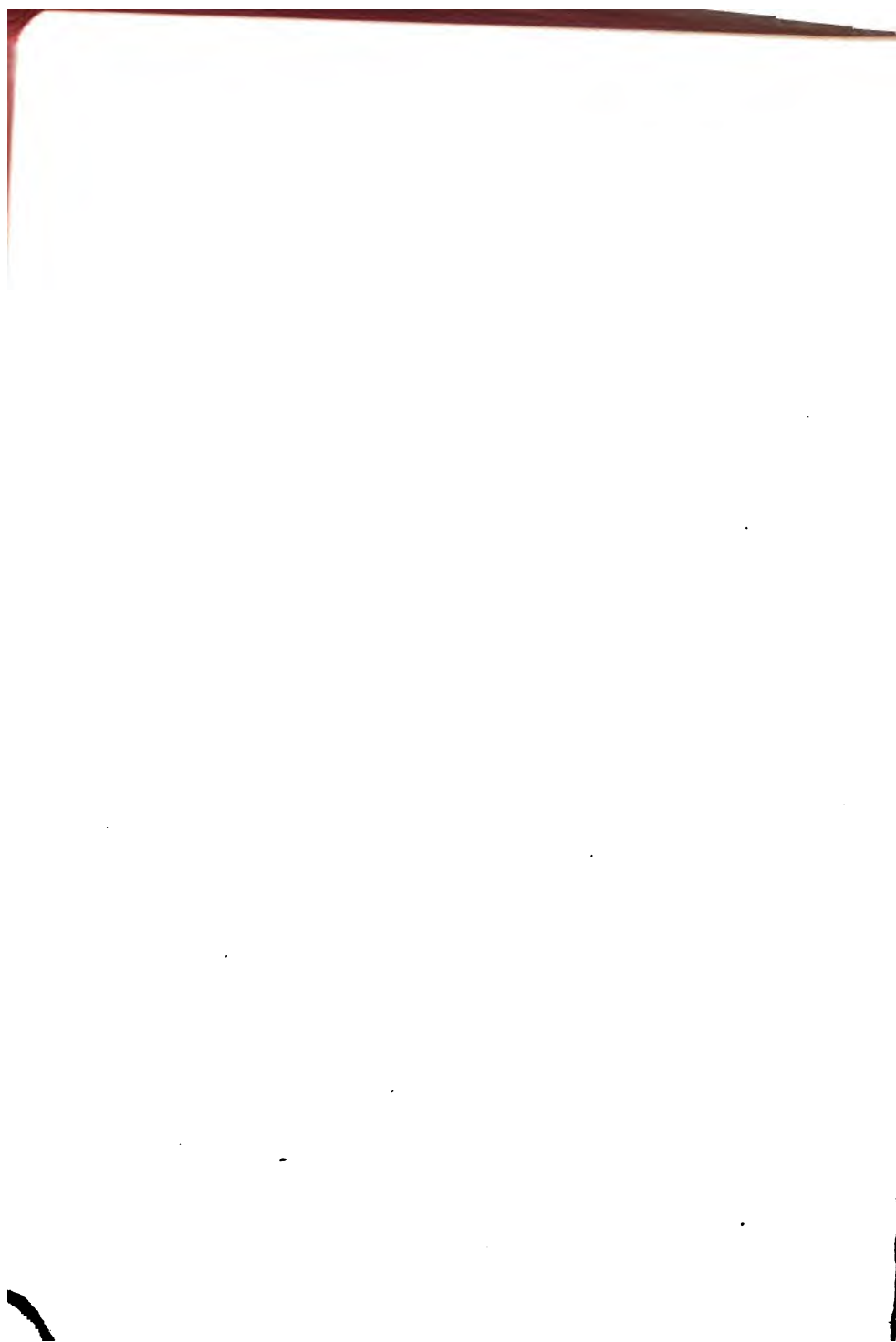


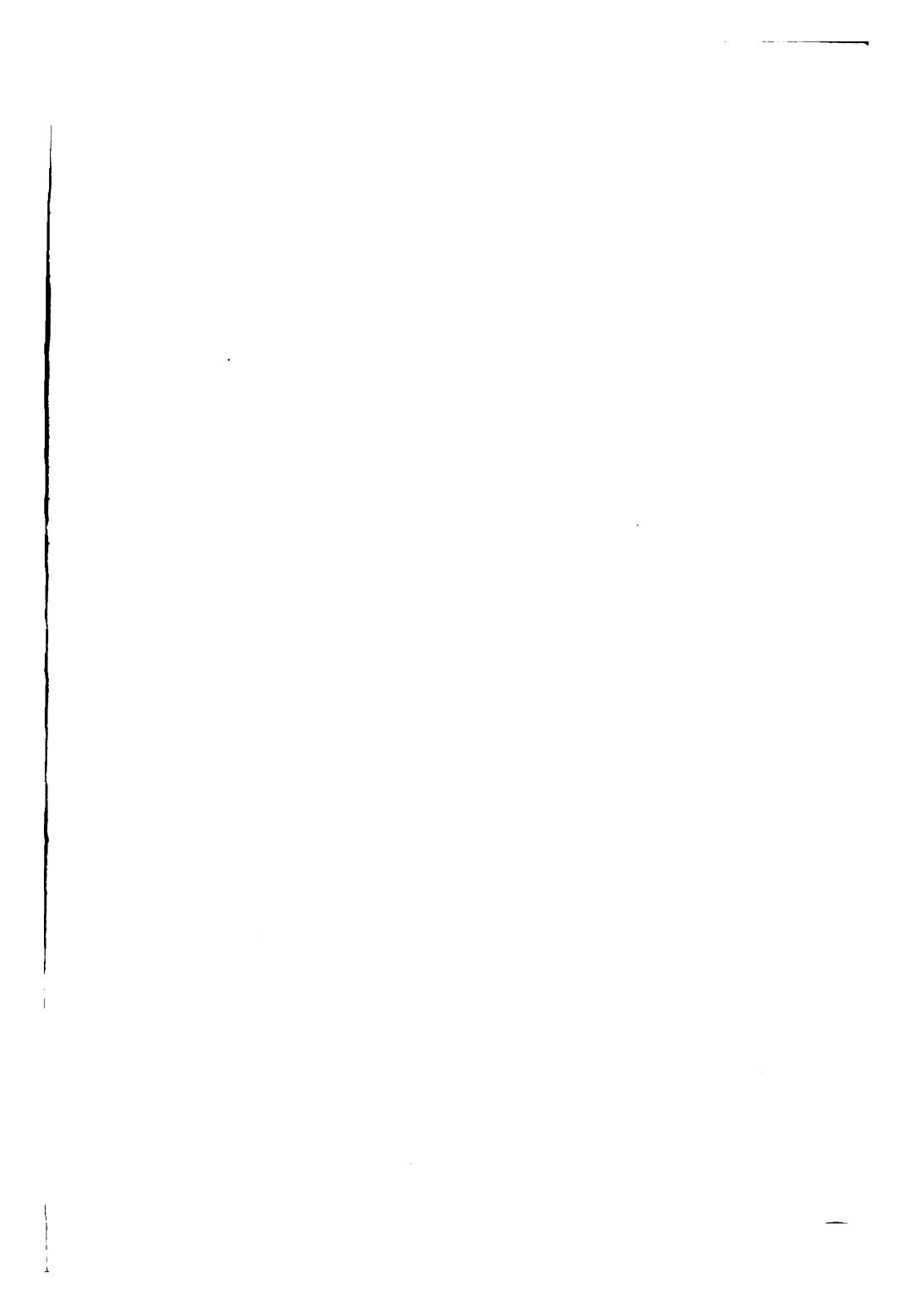


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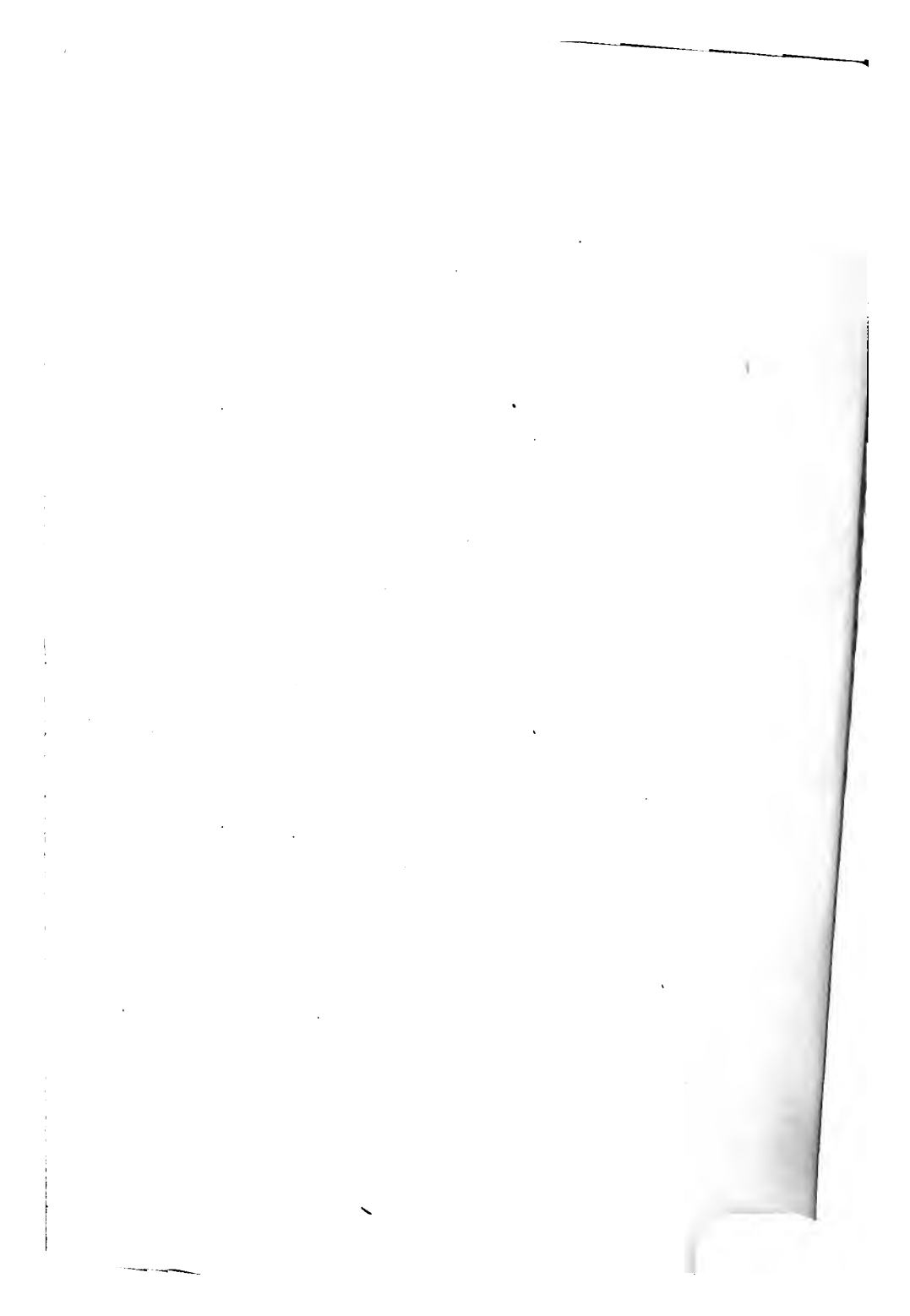
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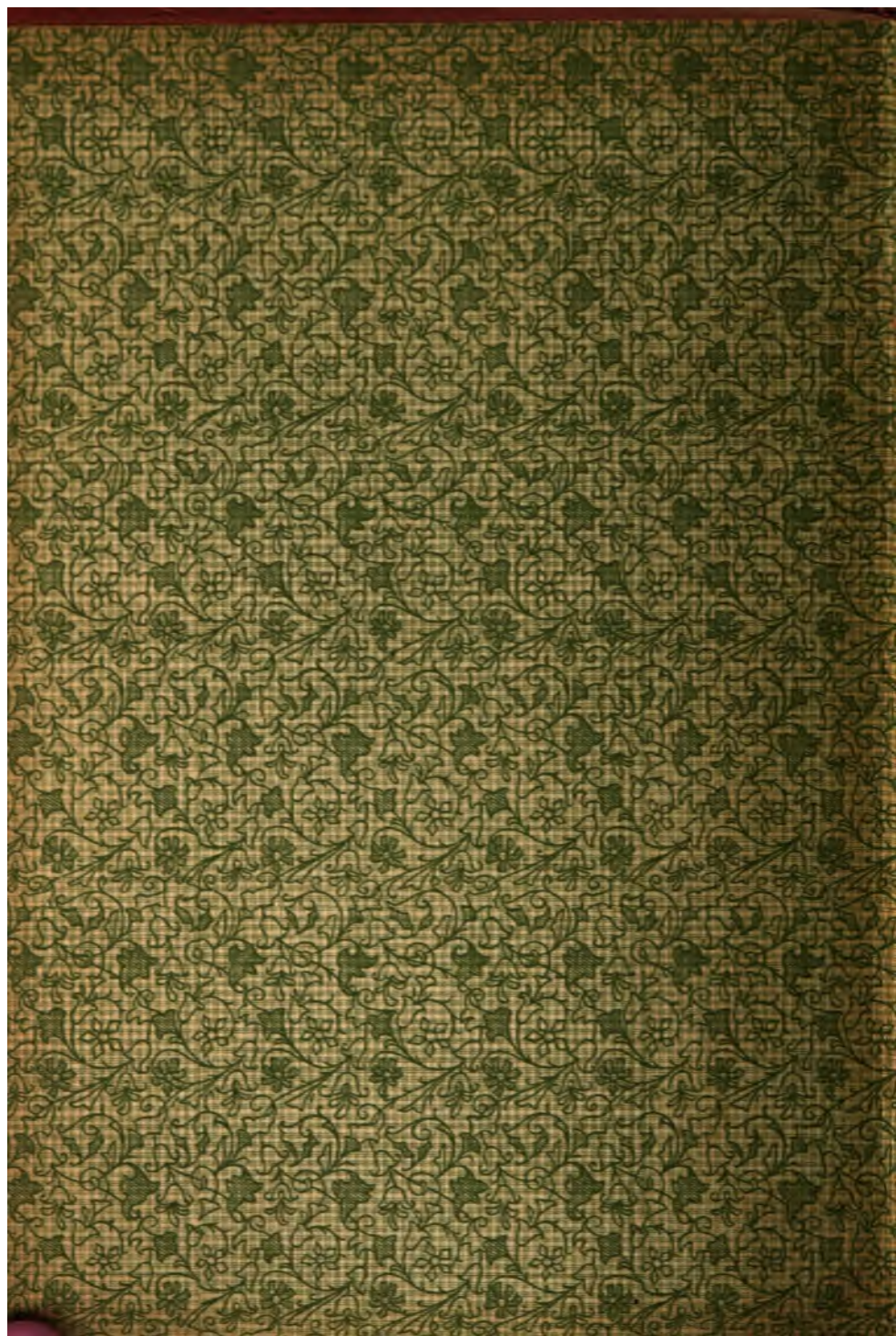
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